Supreme Court, U. S.
FILED
SEP 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ...77-339

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants *et al.*,

Petitioners,

v.

FORWOOD CLOUD WISER, JR., and RICHARD E. NEUMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEE S. KREINDLER
99 Park Avenue
New York, New York 10016
Counsel for Petitioner

MILTON G. SINCOFF
STANLEY J. LEVY
MELVIN I. FRIEDMAN
JAMES D. VEACH

KREINDLER & KREINDLER
New York, New York
Of Counsel

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Treaty Involved	2
Statement	6
Proceedings Below	7
Reasons for Granting the Writ	7
I—This case involves important issues warranting resolution by this Court	7
II—The Circuit's decision conflicts with prior decisions of this Court which prohibit judicial treaty-making	8
III—The Circuit's decision conflicts with the plain language of a United States treaty	10
IV—The Circuit's decision is in derogation of the basic common law right of petitioners to full compensation from the negligent defendants	13
The Common Law	13
The Civil Law	14
Post-Warsaw History	15
Conclusion	17
Certificate of Service	18

CITATIONS

Cases: PAGE

Alexandre v. *Eastern Airlines, Inc.*, 9 Avi. 17,844 (W.D.N.Y. 1965) 16

Brady v. *Roosevelt S.S. Co.*, 317 U.S. 575 (1943) ... 13

Herd & Co. v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959) 13, 14

Mertens v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965) 16

Pierre v. *Eastern Airlines, Inc.*, 152 F.Supp. 486 (D.N.J. 1957) 10

Rocca v. *Thomson*, 223 U.S. 317 (1912) 9

Shaw v. *Railroad Co.*, 101 U.S. 557 (1879) 14

Stratton v. *Trans Canada Airlines*, 27 D.L.R. 2d 670 (B.C.Sup. Ct. 1961), *aff'd on other grounds*, 32 D.L.R. 2d 736 (B.C.Sup. Ct. App. 1962) (R 165-90) 10

Texas & Pacific Railway Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 14

The Amiable Isabella, 19 U.S. (6 Wheat.) 1 (1921) .. 8, 10

TREATY

Warsaw Convention Treaty, 49 Stat. 3000; T.S. 876 .....*Passim*

STATUTES

French Code Napoleon (translated in Von Mehren, THE CIVIL LAW SYSTEM, Ch. 7, p. 339 (1957) 15

Art. 1382 15

Art. 1383 15

PAGE

German Civil Code, Art. 823 15

Italian Civil Code, Title IX, Art. 2043 15

Soviet Civil Code, Law of Obligations, Ch.XII, Art. 403 15

Swiss Code of Oligations, Ch.II, Art. 41 15

U.S. Constitution, Art. VI 10

OTHER AUTHORITIES

19 C.J.S. Corporations, § 845 (1945) 13

Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. Air Law & Comm. 27 (1932) 14

Matte, TRAITE DE DROIT AERIEN-AERONAUTIQUE, 422-23 (1964) 11

Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw, by R. Horner & D. Legrez (English translation 1975) 11

Montreal Agreement. CAB Agreeemnt 18900, Order E-23680, May 13, 1966 (Docket No. 17325) 7

Prosser, LAW OF TORTS, § 93 (4th ed. 1971) 13

Restatement of Agency, Second, § 343 (1957) 13

Shearman & Redfield, LAW OF NEGLIGENCE, § 262 (1941) [1970 Supp.] 13

The Hague Protocol 15, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. .....

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants *et al.*,

Petitioners,

v.

FORWOOD CLOUD WISER, JR., and
RICHARD E. NEUMAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Ruth Ann Reed *et al.*, pray for a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit entered in these proceedings on April 26, 1977.[1]

Opinions Below

The opinion of the Court of Appeals appears at pages 28-56 of the separate appendix ("App.") and is reported at 555 F.2d 1079. The opinion of the Court of Appeals

---

[1] Additional petitioners are Gily Epstein Bard, Jean F. Gilday, Rose Baum Kraut and First National City Bank, and James K. Orphan.

denying petitioners' motion for rehearing or rehearing *en banc* entered June 6, 1977 appears at App. 60. The opinion of the district court appears at App. 61-75 and is reported at 414 F.Supp. 863.

Jurisdiction

The judgment of the Court of Appeals was entered on April 26, 1977. Petitioners' motion for rehearing or rehearing *en banc* was denied on June 6, 1977 (App. 60). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the importance of the issues at bar to this case and numerous pending and future cases warrant the grant of *certiorari*?

2. Should the Warsaw Convention Treaty,[2] which limits the damages recoverable from "the carrier," be judicially extended to its employees and agents?

3. Since the common law rights of passengers to full compensation are derogated by the Warsaw Convention, should it be strictly construed and not extended beyond the scope justified by its language and history?

Treaty Involved

The official French text of the Warsaw Convention, followed by the official English translation, appear in the Statutes at Large, 49 Stat. 3000 *et seq.*, and are set forth in the Appendix. The most immediately relevant provisions

[2] 49 Stat. 3000; T.S. 876.

are contained in Chapter III, "Responsabilite du Transporteur" (49 Stat. 3005)—"Liability of the Carrier" (49 Stat. 3018).

Article 17. (Official French text)

"Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement." 49 Stat. 3005.

Article 17. (Official English translation)

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." 49 Stat. 3018.

Article 20. (Official French text)

"(1) Le transporteur n'est pas responsable s'il prouve que lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage ou qu'il leur était impossible de les prendre.

"(2) Dans les transports de marchandises et de bagages, le transporteur n'est pas responsable, s'il prouve que le dommage provient d'une faute de pilotage, de conduite de l'aéronef ou de navigation, et que, à tous autres égards, lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage." 49 Stat. 3005.

Article 20. (Official English translation)

"(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary meas-

ures to avoid the damage or that it was impossible for him or them to take such measures.

"(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage." 49 Stat. 3019.

Article 22. (Official French text)

"(1) Dans le transport des personnes, la responsabilité du transporteur envers chaque voyageur est limitée à la somme de cent vingt cinq mille francs. Dans le cas où d'après la loi due tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convention spéciale avec le transporteur le voyageur pourra fixed une limite de responsabilité plus élevée." 49 Stat. 3006.

Article 22. (Official English translation)

"(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability." 49 Stat. 3019.

Article 24. (Official French text)

"(1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.

(2) Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs." 49 Stat. 3006.

Article 24. (Official English translation)

"(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

"(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights." 49 Stat. 3020.

Article 24. (Translation by Circuit)[3]

"(1) In the *events anticipated* in articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the *events* covered by article 17 the provisions of the preceding paragraph shall also apply, ..." (Emphasis added to denote the only difference with the official English translation.)

Article 25. (Official French text)

"(1) Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi due tribunal saisi, est considérée comme équivalente au dol.

---

[3] App. 37.

"(2) Ce droit lui sera également refusé si le dommage a été causé dans les mèmes conditions par un de ses préposés agissant dans l'exercise de ses fonctions." 49 Stat. 3006.

Article 25. (Official English translation)

"(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

"(2) Similarly the carrier shall not be entitled to avail himself of these said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment." 49 Stat. 3020.

Statement

This action arises from the crash of a Trans World Airlines (TWA) Boeing 707 in the Ionian Sea on September 8, 1974. All 79 passangers and 9 crewmembers were killed in the crash.

Petitioners are the personal representatives of 9 passengers. They seek compensatory damages from the respondents, employees of TWA, whose negligence was a proximate cause of the crash (R7, 8-16).[4]

In their Answer, respondents asserted as an affirmative defense that the provisions of the Warsaw Convention

[4] References preceded by "R" refer to pages of the record contained in the joint appendix submitted to the Second Circuit.

and the Montreal Agreement[5] limited their liability for damages to a maximum of $75,000 per passenger (R28 ¶ 45).

Proceedings Below

Petitioners moved to strike the damage limitation affirmative defense or, alternatively, for partial summary judgment. The Honorable Marvin E. Frankel, U.S.D.J., granted the motion to strike. 414 F.Supp. 863 (App. 61). On an appeal pursuant to 28 U.S.C. § 1292(b), the Court of Appeals for the Second Circuit reversed the Order of the District Court with instructions to reinstate the damage limitation affirmative defense (App. 58-9).

Reasons for Granting the Writ

I. This case involves important issues warranting resolution by this Court

The importance of the questions raised by this case was recognized by the Circuit Court.

> "The question of whether an airline employee sued for damages for personal injuries may invoke the convention's liability limitations is of great importance to international air disaster litigation and, so far as we know, is here raised for the first time at the federal appellate level" (App. 31).

Vast numbers of Americans travel on international flights each day and many sustain property damage, injury or death each year. Since an American treaty is involved, the Courts, the traveling public and the airlines

[5] CAB Agreement 18900, Order E-23680, May 13, 1966 (Docket No. 17325). By signing the Montreal Agreement, TWA agreed to increase its liability to $75,000 and waived Warsaw's Article 20(1) defense of no fault.

should receive a definitive disposition which only this Court can issue. The Circuit's holding conflicts with prior decisions of this Court (Point II), the language of the Treaty (Point III) and basic common law rights (Point IV).

Aside from the effect upon the numerous families of decedents at bar, resolution of the issues is of much concern in at least two other pending airplane cases involving multiple deaths in which employees of the airline have been sued.[6] It is believed, moreover, that the issue will continue to be raised in other Circuit Courts until this Court sets the matter at rest.

II. The Circuit's decision conflicts with prior decisions of this Court which prohibit judicial treaty-making

The Warsaw Convention specifically limits "the liability of the carrier" to a specific sum. Article 22. The "carrier" is TWA, but the Court below has added "and its employees," words omitted by the Treaty. Over 150 years ago, Mr. Justice Story refused to extend a treaty to a situation omitted therein. *The Amiable Isabella,* 19 U.S. (6 Wheat.) 1 (1921).

> "In the first place, this Court does not possess any treaty-making power. That power belongs by the constitution to another department of the government; and *to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power,* and not an exercise of judicial functions. *It would be to make, and not to construe a treaty.* Neither can this Court supply a casus omissus in a treaty, any more than in a law. *We are to find out the intention of the parties by just rules of interpretation* applied to the subject matter; and having found that, our duty is to follow it as far as it goes, *and to stop where that stops*—whatever may be the imperfections or difficulties which it leaves behind." *Id.* at 71 (emphasis added).

[6] *Air Crash Disaster at Pago, Pago, American Samoa on January 30, 1974,* M.D.L. No. 176, in the Central District of California, and *In re Air Crash at John F. Kennedy International Airport on June 24, 1975,* M.D.L. No. 227, in the Eastern District of New York.

The *Amiable Isabella* prohibits the addition of any omitted words and extension of the Treaty at bar beyond "the carrier".

In *Rocca* v. *Thomson,* 223 U.S. 317, 332 (1912), this Court stated:

> "[T]reaties are the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning and to choose apt words in which to embody the purposes of the high contracting parties. Had it been the intention to commit the administration of estates of citizens of one country, dying in another, exclusively to the consul of the foreign nation, it would have been very easy to have declared that purpose in unmistakeable terms."

Similarly, if the drafters of Warsaw intended to limit the liability of employees and agents of the airlines they could readily have done so in unmistakeable terms. As stated by the District Court, "The limitations for agents and employees would have been easy enough to specify" (App. 68). Just as they defined "international transportation" in article 1(2), the drafters could have simply added a definition of "carrier" that included employees and agents.

The decision of the Circuit Court was in part based on what it believed the drafters of Warsaw would have writ-

ten if they foresaw that the airlines would be required to indemnify and/or insure their employees and agents.[7] But the Circuit's belief is inappropriate because the Treaty's drafters only undertook to limit "the liability of the carrier" and the carrier, TWA, is not a party to this action. The Treaty cannot now be redrafted to do what the drafters omitted or did not intend or consider.

The Circuit Court's decision also is in direct conflict with *Pierre* v. *Eastern Airlines, Inc.*, 152 F.Supp. 486 (D.N.J. 1957) and *Stratton* v. *Trans Canada Airlines*, 27 D.L.R.2d 670 (B.C.Sup. Ct. 1961), *aff'd on other grounds*, 32 D.L.R. 2d 736 (B.C.Sup. Ct. App. 1962) (R 165-90). These cases were followed by the well-reasoned decision of the District Court.

III. The Circuit's decision conflicts with the plain language of a United States treaty

Since the Warsaw Convention is a treaty of the United States, it is the supreme law of the land. U.S. Const. Art. VI. The plain language of the Treaty shows that it limits the liability of the carrier, but not its employees. This Court should exercise its *certiorari* jurisdiction to correct the significant error of the Circuit Court.

There is nothing in any part of Warsaw which imposes liability on or limits the liability of carrier's employee or agent. They simply are outside the scope of Warsaw, which governs only the rights and liabilities of passengers and air carriers.

The operative sections of chapter III of Warsaw, entitled "Liability of the Carrier," which imposes (Article 17) and limits (Article 22) liability refer only to "the carrier." By contrast, Article 20(1) and (2) and Article

[7] The indemnification/insurance development, which post-dates Warsaw, is signficant because it reflects the belief of airlines and their employees that Warsaw did not extend to employees.

25(2), in referring to "agents," specifically draw a distinction between the carrier and employees-agents of the carrier, and show that the liability of the carrier and the liability of employees-agents is separate and independent. Any other interpretation would render the word "agents" in Articles 20 and 25 redundant.

The distinction drawn by Warsaw between the carrier and agents-employees is particularly evidenced by Article 20(2). It declares that the carrier is not liable for property damage caused by pilot error, provided neither the carrier nor his agents were otherwise at fault. But Warsaw contains no provision either imposing liability or relieving the pilot from liability for the damage to property he causes.

There is no basis for the determination by the Circuit that Article 24 supports extension of Warsaw's damage limit to employees and agents. To reach this determination, the Circuit had to change the official English translation that has appeared in the Statutes at Large for over 40 years (both translations appear on page 5 *supra*).[8]

Article 24 was only intended to have Warsaw apply regardless of whether actions were brought by passengers, heirs or personal representatives and whether the action sounded in contract, tort or quasi-contract. This was Professor Matte's[9] analysis of Article 24 and, based on that analysis, he concluded (translation follows the French):

"L'Art 24 de la Convention, dans ses deux alinéas,

[8] Other translators of the word "cas", which also appeared in the proposed draft of Article 24, have translated it as "cases", not "events". Page 211 of Minutes, Second International Conference on Private Aeronautical Law, October 4-12, 1929, Warsaw, by R. Horner & D. Legrez (English translation 1975). The pages of the Warsaw minutes that pertain to Article 24 are set forth in the Appendix in French and English (Horner-Legrez translation). Significantly, the Minutes omit any reference to employees or agents.

[9] Matte, TRAITE DE DROIT AERIEN-AERONAUTIQUE, 422-23 (1964).

precise que les limitations prévues par la Convention, en ce qui concerne la responsabilité du transporteur, se réfèrent également, aux art. 17, 18 et 19 sans préjudice, quant à Part. 17, de la détermination des personnes qui ont le droit d'agir, et de leurs droits respectifs. Ces stipulations ont comme but de garantir l'application uniforme de la Convention, quel que soit le plaignant (la personne contractante ou ses héritiers) (145) et quel que soit le droit d'action (contractuelle délictuelle ou quasi-délictuelle) (146).

"Etant donné que la Convention ne règle que la responsabilité due transporteur dans les circonstances prévues par les arts. 17-19 (responsibilité contractuelle), il y a certaines situations où la Convention n'exclut pas d'autres actions:

"a) La Convention ne s'applique pas aux préposés (et substituts) du transporteur: les actions directes contre ces personnes ne sont pas soumises à la présomption de faute ou des limites de la responsabilité (147); . . ."

"Article 24 of the Convention, in its two paragraphs states that the limitations provided for by the Convention, so far as the liability of the carrier is concerned, pertain likewise to Articles 17, 18 and 19, without prejudice, with respect to Article 17, to the determination of the persons who have the right to act, and of their respective rights. These stipulations have the purpose of guaranteeing the uniform application of the Convention, regardless of who the plaintiff might be (the contracting party or his heirs) (145), and regardless of the right of action (contractual, or delinquent, or quasi-delinquent) (146).

"Since the Convention regulates only the liability of the carrier in the circumstances referred to in Articles 17-19 (contractual liability), there are certain situations in which the Convention does not exclude other actions:

"a) The Convention does not apply to the agents (and substitutes) of the carrier: direct actions against

these persons are not subject to the presumption of fault or of the limits of liability (147); . . ."

IV. The Circuit's decision is in derogation of the basic common law right of petitioners to full compensation from the negligent defendants

The conclusion of the Circuit Court adversely affects the common law rights of the petitioners, many plaintiffs in presently pending cases and numerous Americans to be damaged each year in international transportation.

The Common Law

It is clear that at common law[10] the respondents, independent of their corporate employer, would be personally liable for their negligence in contributing to the deaths of the decedents.

In *Brady* v. *Roosevelt, S.S. Co.*, 317 U.S. 575, 580 (1943), the Court stated:

> "The liability of an agent for his own negligence has long been imbedded in the law . . . [T]he principle is an ancient one . . . ."

See also Prosser, Law of Torts, § 93 (4th ed. 1971); Shearman & Redfield, Law of Negligence, § 262 (1941) [1970 supp.]; 19 C.J.S. Corporations, § 845 (1945); Restatement of Agency, Second, § 343 (1957).

Numerous cases strictly construe and narrowly apply laws in derogation of common law rights. Thus, in a precisely analogous case, *Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 297 (1959), the Carriage of Goods by

---

[10] The civil law, as hereafter discussed, is identical to the common law in this respect.

Sea Act limited the damages recoverable from the carrier. An agent of the carrier claimed the benefit of the limitation. In refusing to extend the limit to the agent, the Court stated:

> "Any such rule of law [shielding an agent from liability for his own negligence], being in derogation of the common law, must be strictly construed, for '[n]o statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express [citation omitted].'" *Id.* at 304-5.

See also *Texas & Pacific Railway Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *Shaw* v. *Railroad Co.*, 101 U.S. 557 (1879).

The Warsaw Convention is in clear derogation of the petitioners' common law right to recover full compensation from TWA. The Circuit Court has further derogated the common law rights of the petitioners by extending Warsaw to the employees of TWA. It has done so, moreover, even though the history, background and language of Warsaw demonstrates its applicability to TWA, but not to the respondents.

The Civil Law

The Warsaw Convention was the work product of the International Technical Committee of Aerial Legal Experts[11] (hereafter the CITEJA). The CITEJA was mainly composed of lawyers from civil law countries.[12] But, as is

---

[11] Comite International Technique d'Experts Juridique Aeriens (CITEJA).

[12] An English lawyer was also a member of the CITEJA. See Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.TE.J.A.)*, 3 J. Air Law & Comm. 27, 48 (1932).

the case under the common law, it is a basic civil law principle that a negligent tortfeasor is personally liable for his own acts. This principle derives from the French Code Napoleon:

> "Art. 1382. Any act by which a person causes damages to another makes the person by whose fault the damage occurred liable to make reparation for such damage.
>
> "Art. 1383. Everyone is liable for the damage he causes not only by his acts, but also by his negligence or imprudence."

These provisions are translated in Von Mehren, THE CIVIL LAW SYSTEM, Ch. 7, p. 339 (1957). See also Italian Civil Code, Title IX, Art. 2043; German Civil Code, Art. 823; Swiss Code of Obligations, Ch. II, Art. 41; Soviet Civil Code, Law of Obligations, Ch. XII, Art. 403.

Despite the fact that the above authorities were presented to the Circuit Court, it concluded that Article 22(1) would have the effect of limiting the liability of employees "in at least some [civil law] jurisdictions" (App. 35). But the Circuit did not cite any civil law jurisdiction, code provision or case to support that startling conclusion. Instead, the Court below relied on the unsupported beliefs expressed by delegates to conferences that took place after Warsaw was adopted (App. 35-7).

Post-Warsaw History

The unsuccessful attempt of the Hague Protocol to extend Warsaw to airline employees also demonstrates the Circuit's error.

The Hague Protocol was drafted by the International Conference on Private Air Law which met at the Hague in 1955. The Hague Conference was called for the express

purpose of revising the Warsaw Convention. Among the amending provisions was a new Article 25A,[12] which expressly extended Warsaw's limit of liability to the carrier's servants and agents.

But Hague was not approved by and thus is not the law in the United States. *Alexandre* v. *Eastern Airlines, Inc.*, 9 Avi. 17,844 (W.D.N.Y. 1965). Cf. *Mertens* v. *Flying Tiger Line, Inc.*, 341 F.2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965). In *Mertens*, a draft protocol submitted to the Hague Conference was relied upon in holding that military charter flights were subject to Warsaw. While the proposed amendment was rejected at the Hague Conference, an Amendment was adopted giving a nation adhering to the Protocol

> "the legal power to declare that the [Warsaw] Convention shall not apply to military charter flights on aircraft registered in that country, . . . *The United States has not yet ratified the Hague Protocol* and obviously has not made the requisite declaration under that Protocol. *The unavoidable conclusion is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit.*" *Mertens, supra* at 854.

---

[12] Article 25A provides:

"1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.

"2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.

"3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

This reasoning should also have been employed by the Circuit in the instant case. Instead, the Circuit erroneously concluded that Warsaw already afforded protection to employees and agents. If this was so, however, there would have been no need for Article 25A.

CONCLUSION

For the foregoing reasons, this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

LEE S. KREINDLER
99 Park Avenue
New York, New York 10016
Counsel for Petitioners

MILTON G. SINCOFF
STANLEY J. LEVY
MELVIN I. FRIEDMAN
JAMES D. VEACH
KREINDLER & KREINDLER
New York, New York
Of Counsel

Certificate of Service.

Melvin I. Friedman, an attorney for petitioner and a member of the Bar of this Court certifies that on September 2, 1977, three copies of the foregoing Petition for a Writ of Certiorari and separate Appendix were served by mail upon all parties required to be served as follows:

John J. Martin
Edward M. O'Brien
Bigham Englar Jones & Houston
Attorneys for Respondents
99 John Street
New York, New York 10038

Dated: September 2, 1977

MELVIN I. FRIEDMAN

Supreme Court, U. S.
FILED
SEP 2 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-339

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants *et al.*,

Petitioners,

v.

FORWOOD CLOUD WISER, JR., and RICHARD E. NEUMAN,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEE S. KREINDLER
99 Park Avenue
New York, New York 10016
Counsel for Petitioner

MILTON G. SINCOFF
STANLEY J. LEVY
MELVIN I. FRIEDMAN
JAMES D. VEACH

KREINDLER & KREINDLER
New York, New York
Of Counsel

TABLE OF CONTENTS TO APPENDIX

PAGE

Convention for the Unification of Certain Rules Relating to International Transportation by Air, Concluded at Warsaw, October 12, 1929.

Appendix A, 49 Stat. at 3000, *et seq.;* T.S. 876 (French) 1a

Appendix B, 49 Stat. at 3014, *et seq.;* T.S. 876 (English Translation) 14a

Appendix C, Opinion of U.S. Court of Appeals, Second Circuit 27a

Appendix D, Judgment of U.S. Court of Appeals, Second Circuit 58a

Appendix E, Order of U.S. Court of Appeals, Second Circuit, Denying the Petition for a Rehearing 60a

Appendix F, Opinion of U.S. District Court, Southern District of New York 61a

Warsaw Convention Minutes

Appendix G, Official French Transcript 76a

Appendix H, English Translation 82a

APPENDIX A

WARSAW CONVENTION (French), 49 Stat. at 3000 *et seq.*

October 12, 1929. *Convention and additional protocol between the United States of America and other powers relating to International Air Transportation. Concluded at Warsaw, October 12, 1929; adherence advised by the Senate, with reservation, June 15, 1934; adherence declared by the President, with reservation, June 27, 1934; declaration of adherence of the United States deposited at Warsaw, July 31, 1934; proclaimed, October 29, 1934.*

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Proclamation of the President.

WHEREAS a convention for the unification of certain rules relating to international transportation by air and an additional protocol thereto relating to Article 2 of the convention, were signed at Warsaw by the respective plenipotentiaries of certain countries, the originals of which convention and additional protocol, done at Warsaw, in the French language, October 12, 1929, and left open for signature until January 31, 1930, are word for word as follows:

Post, p. 3025.

CONVENTION POUR L'UNIFICATION DE CERTAINES RÈGLES RELATIVES AU TRANSPORT AÉRIEN INTERNATIONAL.

LE PRÉSIDENT DU REICH ALLEMAND, LE PRÉSIDENT FÉDÉRAL DE LA RÉPUBLIQUE D'AUTRICHE, SA MAJESTÉ LE ROI DES BELGES, LE PRÉSIDENT DES ÉTATS-UNIS DU BRÉSIL, SA MAJESTÉ LE ROI DES BULGARES, LE PRÉSIDENT DU GOUVERNEMENT NATIONALISTE DE CHINE, SA MAJESTÉ LE ROI DE DANEMARK ET D'ISLANDE, SA MAJESTÉ LE ROI D'ÉGYPTE, SA MAJESTÉ LE ROI D'ESPAGNE, LE CHEF D'ÉTAT DE LA RÉPUBLIQUE D'ESTONIE, LE PRÉSIDENT DE LA RÉPUBLIQUE DE FINLANDE, LE PRÉSIDENT DE LA RÉPUBLIQUE FRANÇAISE, SA MAJESTÉ LE ROI DE GRANDE-BRETAGNE, D'IRLANDE ET DES TERRITOIRES BRITANNIQUES AU DELÀ DES MERS, EMPEREUR DES INDES, LE PRÉSIDENT DE LA RÉPUBLIQUE HELLÉNIQUE, SON ALTESSE SÉRÉNISSIME LE RÉGENT DU ROYAUME DE HONGRIE, SA MAJESTÉ LE ROI D'ITALIE, SA MAJESTÉ L'EMPEREUR DU JAPON, LE PRÉSIDENT DE LA RÉPUBLIQUE DE LETTONIE, SON ALTESSE ROYALE LA GRANDE DUCHESSE DE LUXEMBOURG, LE PRÉSIDENT DES ÉTATS-UNIS DU MÉXIQUE, SA MAJESTÉ LE ROI DE NORVÈGE, SA MAJESTÉ LA REINE DES PAYS-BAS, LE PRÉSIDENT DE LA RÉPUBLIQUE DE POLOGNE, SA MAJESTÉ LE ROI DE ROUMANIE, SA MAJESTÉ LE ROI DE SUÈDE, LE CONSEIL FÉDÉRAL SUISSE, LE PRÉSIDENT DE LA RÉPUBLIQUE TCHÉCOSLOVAQUE, LE COMITÉ CENTRAL EXÉCUTIF DE L'UNION DES RÉPUBLIQUES SOVIÉTISTES SOCIALISTES, LE PRÉSIDENT DES ÉTATS-UNIS DU VENEZUELA, SA MAJESTÉ LE ROI DE YOUGOSLAVIE,

ayant reconnu l'utilité de régler d'une manière uniforme les conditions du transport aérien international en ce qui concerne les documents utilisés pour ce transport et la responsabilité du transporteur,

à cet effet ont nommé leurs Plénipotentiaires respectifs lesquels, dûment autorisés, ont conclu et signé la Convention suivante:

Appendix A

Chapitre Premier. Objet—Définitions.

Article Premier.

(1) La présente Convention s'applique à tout transport international de personnes, bagages ou marchandises, effectué par aéronef contre rémunération. Elle s'applique également aux transports gratuits effectués par aéronef par une entreprise de transports aériens.

(2) Est qualifié „transport international", au sens de la présente Convention, tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux Hautes Parties Contractantes, soit sur le territoire d'une seule Haute Partie Contractante, si une escale est prévue dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une autre Puissance même non Contractante. Le transport sans une telle escale entre les territoires soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité de la même Haute Partie Contractante n'est pas considéré comme international au sens de la présente Convention.

(3) Le transport à exécuter par plusieurs transporteurs par air successifs est censé constituer pour l'application de cette Convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats et il ne perd pas son caractère international par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une même Haute Partie Contractante.

Article 2.

(1) La Convention s'applique aux transports effectués par l'État ou les autres personnes juridiques de droit public, dans les conditions prévues à l'article 1er.

(2) Sont exceptés de l'application de la présente Convention les transports effectués sous l'empire de conventions postales internationales.

Chapitre II. Titres de Transport.

section i.—billet de passage.

Article 3.

(1) Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes:

a) le lieu et la date de l'émission;

b) les points de départ et de destination;

c) les arrêts prévus, sous réserve de la faculté pour le transporteur de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;

d) le nom et l'adresse du ou des transporteurs;

e) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

(2) L'absence, l'irrégularité ou la perte du billet n'affecte ni l'existence, ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte le voyageur sans qu'il ait été délivré un billet de passage, il n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

Appendix A

section ii.—bulletin de bagages.

Article 4.

(1) Dans le transport de bagages, autres que les menus objets personnels dont le voyageur conserve la garde, le transporteur est tenu de délivrer un bulletin de bagages.

(2) Le bulletin de bagages est établi en deux exemplaires, l'un pour le voyageur, l'autre pour le transporteur.

(3) Il doit contenir les mentions suivantes:

a) le lieu et la date de l'émission;

b) les points de départ et de destination;

c) le nom et l'adresse du ou des transporteurs;

d) le numéro du billet de passage;

e) l'indication que la livraison des bagages est faite au porteur du bulletin;

f) le nombre et le poids des colis;

g) le montant de la valeur déclarée conformément à l'article 22 alinéa 2;

h) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

(4) L'absence, l'irrégularité ou la perte du bulletin n'affecte ni l'existence, ni la validité du contrat de transport que n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte les bagages sans qu'il ait été délivré un bulletin ou si le bulletin ne contient pas les mentions indiquées sous les lettres d), f), h), le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

section iii.—lettre de transport aérien.

Article 5.

(1) Tout transporteur de marchandises a le droit de demander à l'expéditeur l'établissement et la remise d'un titre appelé: „lettre de transport aérien"; tout expéditeur a le droit de demander au transporteur l'acceptation de ce document.

(2) Toutefois, l'absence, l'irrégularité ou la perte de ce titre n'affecte ni l'existence, ni la validité du contrat de transport qui n'en sera pas moins soumis aux règles de la présente Convention, sous réserve des dispositions de l'article 9.

Article 6.

(1) La lettre de transport aérien est établie par l'expéditeur en trois exemplaires originaux et remise avec la marchandise.

(2) Le premier exemplaire porte la mention „pour le transporteur"; il est signé par l'expéditeur. Le deuxième exemplaire porte la mention „pour le destinataire"; il est signé par l'expéditeur et le transporteur et il accompagne la marchandise. Le troisième exemplaire est signé par le transporteur et remis par lui à l'expéditeur après acceptation de la marchandise.

(3) La signature du transporteur doit être apposée dès l'acceptation de la marchandise.

(4) La signature du transporteur peut être remplacée par un timbre; celle de l'expéditeur peut être imprimée ou remplacée par un timbre.

(5) Si, à la demande de l'expéditeur, le transporteur établit la lettre de transport aérien, il est considéré jusqu'à preuve contraire. comme agissant pour le compte de l'expéditeur.

Appendix A

Article 7.

Le transporteur de marchandises a le droit de demander à l'expéditeur l'établissement de lettres de transport aérien différentes lorsqu'il y a plusieurs colis.

Article 8.

La lettre de transport aérien doit contenir les mentions suivantes:

a) le lieu où le document a été créé et la date à laquelle il a été établi;

b) les points de départ et de destination;

c) les arrêts prévus, sous réserve de la faculté, pour le transporteur, de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international;

d) le nom et l'adresse de l'expéditeur;

e) le nom et l'adresse du premier transporteur;

f) le nom et l'adresse du destinataire, s'il y a lieu;

g) la nature de la marchandise;

h) le nombre, le mode d'emballage, les marques particulières ou les numéros des colis;

i) le poids, la quantité, le volume ou les dimensions de la marchandise;

j) l'état apparent de la marchandise et de l'emballage;

k) le prix du transport s'il est stipulé, la date et le lieu de paiement et la personne qui doit payer;

l) si l'envoi est fait contre remboursement, le prix des marchandises et, éventuellement, le montant des frais;

m) le montant de la valeur déclarée conformément à l'article 22, alinéa 2;

n) le nombre d'exemplaires de la lettre de transport aérien;

o) les documents transmis au transporteur pour accompagner la lettre de transport aérien;

p) le délai de transport et indication sommaire de la voie à suivre (*ma*) s'ils ont été stipulés;

q) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

Article 9.

Si le transporteur accepte des marchandises sans qu'il ait été établi une lettre de transport aérien, ou si celle-ci ne contient pas toutes les mentions indiquées par l'article 8 [a) à i) inclusivement et q)], le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

Article 10.

(1) L'expéditeur est responsable de l'exactitude des indications et déclarations concernant la marchandise qu'il inscrit dans la lettre de transport aérien.

(2) Il supportera la responsabilité de tout dommage subi par le transporteur ou toute autre personne à raison de ses indications et déclarations irrégulières, inexactes ou incomplètes.

Article 11.

(1) La lettre de transport aérien fait foi, jusqu'à preuve contraire, de la conclusion du contrat, de la réception de la marchandise et des conditions du transport.

104019°—36—PT II——61

Appendix A

(2) Les énonciations de la lettre de transport aérien, relatives au poids, aux dimensions et à l'emballage de la marchandise ainsi qu'au nombre des colis font foi jusqu'à preuve contraire; celles relatives à la quantité, au volume et à l'état de la marchandise ne font preuve contre le transporteur qu'autant que la vérification en a été faite par lui en présence de l'expéditeur, et constatée sur la lettre de transport aérien, ou qu'il s'agit d'énonciations relatives à l'état apparent de la marchandise.

Article 12.

(1) L'expéditeur a le droit sous la condition d'exécuter toutes les obligations résultant du contrat de transport, de disposer de la marchandise, soit en la retirant à l'aérodrome de départ ou de destination, soit en l'arrêtant en cours de route lors d'un atterrissage, soit en la faisant délivrer au lieu de destination ou en cours de route à une personne autre que le destinataire indiqué sur la lettre de transport aérien, soit en demandant son retour à l'aérodrome de départ, pour autant que l'exercice de ce droit ne porte préjudice ni au transporteur, ni aux autres expéditeurs et avec l'obligation de rembourser les frais qui en résultent.

(2) Dans le cas ou l'exécution des ordres de l'expéditeur est impossible, le transporteur doit l'en aviser immédiatement.

(3) Si le transporteur se conforme aux ordres de disposition de l'expéditeur, sans exiger la production de l'exemplaire de la lettre de transport aérien délivré à celui-ci, il sera responsable, sauf son recours contre l'expéditeur, du préjudice qui pourrait être causé par ce fait à celui qui est régulièrement en possession de la lettre de transport aérien.

(4) Le droit de l'expéditeur cesse au moment où celui du destinataire commence, conformément à l'article 13 ci-dessous. Toutefois, si le destinataire refuse la lettre de transport ou la marchandise, ou s'il ne peut être atteint, l'expéditeur reprend son droit de disposition.

Article 13.

(1) Sauf dans les cas indiqués à l'article précédent, le destinataire a le droit, dès l'arrivée de la marchandise au point de destination, de demander au transporteur de lui remettre la lettre de transport aérien et de lui livrer la marchandise contre le paiement du montant des créances et contre l'exécution des conditions de transport indiquées dans la lettre de transport aérien.

(2) Sauf stipulation contraire, le transporteur doit aviser le destinataire dès l'arrivée de la marchandise.

(3) Si la perte de la marchandise est reconnue par le transporteur ou si, à l'expiration d'un délai de sept jours après qu'elle aurait dû arriver, la marchandise n'est pas arrivée, le destinataire est autorisé à faire valoir vis-à-vis du transporteur les droits résultant du contrat de transport.

Article 14.

L'expéditeur et le destinataire peuvent faire valoir tous les droits qui leur sont respectivement conférés par les articles 12 et 13, chacun en son propre nom, qu'il agisse dans son propre intérêt ou dans l'intérêt d'autrui, à condition d'exécuter les obligations que le contrat impose.

Article 15.

(1) Les articles 12, 13 et 14 ne portent aucun préjudice ni aux rapports de l'expéditeur et du destinataire entre eux, ni aux rapports des tiers dont les droits proviennent, soit de l'expéditeur, soit du destinataire.

(2) Toute clause dérogeant aux stipulations des articles 12, 13 et 14 doit être inscrite dans la lettre de transport aérien.

Article 16.

(1) L'expéditeur est tenu de fournir les renseignements et de joindre à la lettre de transport aérien les documents qui, avant la remise de la marchandise au destinataire, sont nécessaires à l'accomplissement des formalités de douane, d'octroi ou de police. L'expéditeur est responsable envers le transporteur de tous dommages qui pourraient résulter de l'absence, de l'insuffisance ou de l'irrégularité de ces renseignements et pièces, sauf le cas de faute de la part du transporteur ou de ses préposés.

(2) Le transporteur n'est pas tenu d'examiner si ces renseignements et documents sont exacts ou suffisants.

Chapitre III. Responsabilité du Transporteur.

Article 17.

Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

Article 18.

(1) Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistrés ou de marchandises lorsque l'événement qui a causé le dommage s'est produit pendant le transport aérien.

(2) Le transport aérien, au sens de l'alinéa précédent, comprend la période pendant laquelle les bagages ou marchandises se trouvent sous la garde du transporteur, que ce soit dans un aérodrome ou à bord d'un aéronef ou dans un lieu quelconque en cas d'atterrissage en dehors d'un aérodrome.

(3) La période du transport aérien ne couvre aucun transport terrestre, maritime ou fluvial effectué en dehors d'un aérodrome. Toutefois lorsqu'un tel transport est effectué dans l'exécution du contrat de transport aérien en vue du chargement, de la livraison ou du transbordement, tout dommage est présumé, sauf preuve contraire, résulter d'un événement survenu pendant le transport aérien.

Article 19.

Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de voyageurs, bagages ou marchandises.

Article 20.

(1) Le transporteur n'est pas responsable s'il prouve que lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage ou qu'il leur était impossible de les prendre.

(2) Dans les transports de marchandises et de bagages, le transporteur n'est pas responsable, s'il prouve que le dommage provient d'une faute de pilotage, de conduite de l'aéronef ou de navigation, et que, à tous autres égards, lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage.

Article 21.

(1) Dans le cas où le transporteur fait la preuve que la faute de la personne lésée a causé le dommage ou y a contribué, le tribunal pourra, conformément aux dispositions de sa propre loi, écarter ou atténuer la responsabilité du transporteur.

Article 22.

(1) Dans le transport des personnes, la responsabilité du transporteur envers chaque voyageur est limitée à la somme de cent vingt cinq mille francs. Dans le cas où, d'après la loi du tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convention spéciale avec le transporteur, le voyageur pourra fixer une limite de responsabilité plus élevée.

(2) Dans le transport de bagages enregistrés et de marchandises, la responsabilité du transporteur est limitée à la somme de deux cent cinquante francs par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une taxe supplémentaire éventuelle. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il ne prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

(3) En ce qui concerne les objets dont le voyageur conserve la garde, la responsabilité du transporteur est limitée à cinq mille francs par voyageur.

(4) Les sommes indiquées ci-dessus sont considérées comme se rapportant au franc français constitué par soixante-cinq et demie milligrammes d'or au titre de neuf cents millièmes de fin. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.

Article 23.

Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente Convention est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions de la présente Convention.

Article 24.

(1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.

(2) Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs.

Article 25.

(1) Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol.

(2) Ce droit lui sera également refusé si le dommage a été causé dans les mêmes conditions par un de ses préposés agissant dans l'exercice de ses fonctions.

Article 26.

(1) La réception des bagages et marchandises sans protestation par le destinataire constituera présomption, sauf preuve contraire,

Appendix A

ue les marchandises ont été livrées en bon état et conformément au itre de transport.

(2) En cas d'avarie le destinataire doit adresser au transporteur ne protestation immédiatement après la découverte de l'avarie et, u plus tard, dans un délai de trois jours pour les bagages et de sept ours pour les marchandises à dater de leur réception. En cas de etard, la protestation devra être faite au plus tard dans les quatorze ours à dater du jour où le bagage ou la marchandise auront été mis à a disposition.

(3) Toute protestation doit être faite par réserve inscrite sur le itre de transport ou par un autre écrit expédié dans le délai prévu our cette protestation.

(4) À défaut de protestation dans les délais prévus, toutes actions ontre le transporteur sont irrecevables, sauf le cas de fraude de elui-ci.

Article 27.

En cas de décès du débiteur, l'action en responsabilité, dans les imites prévues par la présente Convention, s'exerce contre ses ayants lroit.

Article 28.

(1) L'action en responsabilité devra être portée, au choix du lemandeur, dans le territoire d'une des Hautes Parties Contractantes, oit devant le tribunal du domicile du transporteur, du siège principal le son exploitation ou du lieu où il possède un établissement par le oin duquel le contrat a été conclu, soit devant le tribunal du lieu de lestination.

(2) La procédure sera réglée par la loi du tribunal saisi.

Article 29.

(1) L'action en responsabilité doit être intentée, sous peine de déchéance, dans le délai de deux ans à compter de l'arrivée à destination ou du jour où l'aéronef aurait dû arriver, ou de l'arrêt du transport.

(2) Le mode du calcul du délai est déterminé par la loi du tribunal saisi.

Article 30.

(1) Dans les cas de transport régis par la définition du troisième alinéa de l'article premier, à exécuter par divers transporteurs successifs, chaque transporteur acceptant des voyageurs, des bagages ou des marchandises est soumis aux règles établies par cette Convention, et est censé être une des parties contractantes du contrat de transport, pour autant que ce contrat ait trait à la partie du transport effectuée sous son contrôle.

(2) Au cas d'un tel transport, le voyageur ou ses ayants droit ne pourront recourir que contre le transporteur ayant effectué le transport au cours duquel l'accident ou le retard s'est produit, sauf dans le cas où, par stipulation expresse, le premier transporteur aura assuré la responsabilité pour tout le voyage.

(3) S'il s'agit de bagages ou de marchandises, l'expéditeur aura recours contre le premier transporteur et le destinataire qui a le droit à la délivrance contre le dernier, et l'un et l'autre pourront, en outre, agir contre le transporteur ayant effectué le transport au cours duquel la destruction, la perte, l'avarie ou le retard se sont produits. Ces transporteurs seront solidairement responsables envers l'expéditeur et le destinataire.

Appendix A

Chapitre IV. Dispositions Relatives aux Transports Combinés.

Article 31.

(1) Dans le cas de transports combinés effectués en partie par air et en partie par tout autre moyen de transport, les stipulations de la présente Convention ne s'appliquent qu'au transport aérien et si celui-ci répond aux conditions de l'article premier.

(2) Rien dans la présente Convention n'empêche les parties, dans le cas de transports combinés, d'insérer dans le titre de transport aérien des conditions relatives à d'autres modes de transport, à condition que les stipulations de la présente Convention soient respectées en ce qui concerne le transport par air.

Chapitre V. Dispositions Générales et Finales.

Article 32.

(1) Sont nulles toutes clauses du contrat de transport et toutes conventions particulières antérieures au dommage par lesquelles les parties dérogeraient aux règles de la présente Convention soit par une détermination de la loi applicable, soit par une modification des règles de compétence. Toutefois, dans le transport des marchandises, les clauses d'arbitrage sont admises, dans les limites de la présente Convention, lorsque l'arbitrage doit s'effectuer dans les lieux de compétence des tribunaux prévus à l'article 28 alinéa 1.

Article 33.

Rien dans la présente Convention ne peut empêcher un transporteur de refuser la conclusion d'un contrat de transport ou de formuler des règlements qui ne sont pas en contradiction avec les dispositions de la présente Convention.

Article 34.

La présente Convention n'est applicable ni aux transports aériens internationaux exécutés à titre de premiers essais par des entreprises de navigation aérienne en vue de l'établissement de lignes régulières de navigation aérienne ni aux transports effectués dans des circonstances extraordinaires en dehors de toute opération normale de l'exploitation aérienne.

Article 35.

Lorsque dans la présente Convention il est question de jours, il s'agit de jours courants et non de jours ouvrables.

Article 36.

La présente Convention est rédigée en français en un seul exemplaire qui restera déposé aux archives du Ministère des Affaires Étrangères de Pologne, et dont une copie certifiée conforme sera transmise par les soins du Gouvernement Polonais au Gouvernement de chacune des Hautes Parties Contractantes.

Article 37.

(1) La présente Convention sera ratifiée. Les instruments de ratification seront déposés aux archives du Ministère des Affaires Étrangères de Pologne, qui en notifiera le dépôt au Gouvernement de chacune des Hautes Parties Contractantes.

(2) Dès que la présente Convention aura été ratifiée par cinq des Hautes Parties Contractantes, elle entrera en vigueur entre Elles le quatre-vingt-dixième jour après le dépôt de la cinquième ratification. Ultérieurement elle entrera en vigueur entre les Hautes Parties

Contractantes qui l'auront ratifiée et la Haute Partie Contractante qui déposera son instrument de ratification le quatre-vingt dixième jour après son dépôt.

(3) Il appartiendra au Gouvernement de la République de Pologne de notifier au Gouvernement de chacune des Hautes Parties Contractantes la date de l'entrée en vigueur de la présente Convention ainsi que la date du dépôt de chaque ratification.

Article 38.

(1) La présente Convention, après son entrée en vigueur, restera ouverte à l'adhésion de tous les États.

(2) L'adhésion sera effectuée par une notification adressée au Gouvernement de la République de Pologne, qui en fera part au Gouvernement de chacune des Hautes Parties Contractantes.

(3) L'adhésion produira ses effets à partir du quatre-vingt-dixième jour après la notification faite au Gouvernement de la République de Pologne.

Article 39.

(1) Chacune des Hautes Parties Contractantes pourra dénoncer la présente Convention par une notification faite au Gouvernement de la République de Pologne, qui en avisera immédiatement le Gouvernement de chacune des Hautes Parties Contractantes.

(2) La dénonciation produira ses effets six mois après la notification de la dénonciation et seulement à l'égard de la Partie qui y aura procédé.

Article 40.

(1) Les Hautes Parties Contractantes pourront, au moment de la signature, du dépôt des ratifications, ou de leur adhésion, déclarer que l'acceptation qu'Elles donnent à la présente Convention ne s'applique pas à tout ou partie de leurs colonies, protectorats, territoires sous mandat, ou tout autre territoire soumis à leur souveraineté ou à leur autorité, ou à tout autre territoire sous suzeraineté.

(2) En conséquence Elles pourront ultérieurement adhérer séparément au nom de tout ou partie de leurs colonies, protectorats, territoire sous mandat, ou tout autre territoire soumis à leur souveraineté ou à leur autorité, ou tout territoire sous suzeraineté ainsi exclus de leur déclaration originelle.

(3) Elles pourront aussi, en se conformant à ses dispositions, dénoncer la présente Convention séparément ou pour tout ou partie de leurs colonies, protectorats, territoires sous mandat, ou tout autre territoire soumis à leur souveraineté ou à leur autorité, ou tout autre territoire sous suzeraineté.

Article 41.

Chacune des Hautes Parties Contractantes aura la faculté au plus tôt deux ans après la mise en vigueur de la présente Convention de provoquer la réunion d'une nouvelle Conférence Internationale dans le but de rechercher les améliorations qui pourraient être apportées à la présente Convention. Elle s'adressera dans ce but au Gouvernement de la République Française qui prendra les mesures nécessaires pour préparer cette Conférence.

La présente Convention, faite à Varsovie le 12 octobre 1929 restera ouverte à la signature jusqu'au 31 janvier 1930.

Pour l'Allemagne:

(—) R. Richter
(—) Dr. A. Wegerdt
(—) Dr. E. Albrecht
(—) Dr. Otto Riese

Pour l'Autriche:

(—) Strobele
(—) Reinoehl

Pour la Belgique:

(—) Bernard de l'Escaille

Pour les États-Unis du Brésil:

(—) Alcibiades Peçanha

Pour la Bulgarie:

Pour la Chine:

Pour le Danemark:

(—) L. Ingerslev
(—) Knud Gregersen

Pour l'Égypte:

Pour l'Espagne:

(—) Silvio Fernandez-Vallin

Pour l'Estonie:

Pour la Finlande:

Pour la France:

(—) Pierre Étienne Flandin
(—) Georges Ripert

Pour la Grande-Bretagne et l'Irlande du Nord:

(—) A. H. Dennis
(—) Orme Clarke
(—) R. L. Megarry

Pour le Commonwealth d'Australie:

(—) A. H. Dennis
(—) Orme Clarke
(—) R. L. Megarry

Pour l'Union Sud-Africaine:

(—) A. H. Dennis
(—) Orme Clarke
(—) R. L. Megarry

Pour la République Hellénique:

(—) G. C. Lagoudakis

Pour la Hongrie:

Pour l'Italie:

(—) A. Giannini

Pour le Japon:

(—) Kazuo Nishikawa

Pour la Lettonie:

(—) M. Nukša

Pour le Luxembourg:

(—) E. Arendt

Appendix A

Pour le Mexique:

Pour la Norvège:
(—) N. Chr. Ditleff

Pour les Pays-Bas:
(—) W. B. Engelbrecht

Pour la Pologne:
(—) Auguste Zaleski
(—) Alfons Kühn

Pour la Roumanie:
(—) G. Cretziano

Pour la Suède:

Pour la Suisse:
(—) Edm. Pittard
(—) Dr. F. Hess

Pour la Tchécoslovaquie:
(—) Dr. V. Girsa

Pour l'Union des Républiques Soviétistes Socialistes:
(—) Kotzubinsky

Pour le Venezuela:

Pour la Yougoslavie:
(—) Ivo de Giulli

Protocole Additionnel.

Ad Article 2.

Les Hautes Parties Contractantes se réservent le droit de déclarer au moment de la ratification ou de l'adhésion que l'article 2 alinéa premier, de la présente Convention ne s'appliquera pas aux transports internationaux aériens effectués directement par l'État, ses colonies, protectorats, territoires sous mandat ou tout autre territoire sous sa souveraineté, sa suzeraineté ou son autorité.

Pour l'Allemagne:
(—) R. Richter
(—) Dr. A. Wegerdt
(—) Dr. E. Albrecht
(—) Dr. iur. Otto Riese

Pour l'Autriche:
(—) Strobele
(—) Reinoehl

Pour la Belgique:
(—) Bernard de l'Escaille

Pour les États-Unis du Brésil:
(—) Alcibiades Peçanha

Pour la Bulgarie:

Pour la Chine:

Appendix A

Pour le Danemark:
(—) L. Ingerslev
(—) Knud Gregersen

Pour l'Égypte:

Pour l'Espagne:
(—) Silvio Fernandez-Vallin

Pour l'Estonie:

Pour la Finlande:

Pour la France:
(—) Pierre Étienne Flandin
(—) Georges Ripert

Pour la Grande-Bretagne et l'Irlande du Nord:
(—) A. H. Dennis
(—) Orme Clarke
(—) R. L. Megarry

Pour le Commonwealth d'Australie:
(—) A. H. Dennis
(—) Orme Clarke
(—) R. L. Megarry

Pour l'Union Sud-Africaine:
(—) A. H. Dennis
(—) Orme Clarke
(—) R. L. Megarry

Pour la République Hellénique:
(—) G. C. Lagoudakis

Pour la Hongrie:

Pour l'Italie:
(—) A. Giannini

Pour le Japon:
(—) Kazuo Nishikawa

Pour la Lettonie:
(—) M. Nukša

Pour le Luxembourg:
(—) E. Arendt

Pour le Mexique:

Pour la Norvège:
(—) N. Chr. Ditleff

Pour les Pays-Bas:
(—) W. B. Engelbrecht

Pour la Pologne:
(—) Auguste Zaleski
(—) Alfons Kühn

Pour la Roumanie:
(—) G. Cretziano

Pour la Suède:

Appendix A

Pour la Suisse:
(—) EDM. PITTARD
(—) Dr. F. HESS
Pour la Tchécoslovaquie:
(—) Dr. V. GIRSA
Pour l'Union des Républiques Soviétistes Socialistes:
(—) KOTZUBINSKY
Pour le Venezuela:
Pour la Yougoslavie:
(—) IVO DE GIULLI

AND WHEREAS the said convention came into force on February 13, 1933, and, pursuant to a provision of the first paragraph of Article 38, remained open thereafter for adherence by any state;

Adherence, subject to reservation.

AND WHEREAS the said convention and the said additional protocol have been definitively adhered to by the United States of America, subject to the reservation, as is provided for in the additional protocol, that the first paragraph of Article 2 of the convention shall not apply to international transportation that may be performed by the United States of America or any territory or possession under its jurisdiction, and the instrument of adherence was deposited in the archives of the Ministry for Foreign Affairs of Poland on July 31, 1934;

Effective date.

AND WHEREAS, in accordance with the third paragraph of Article 38 of the convention, the adherence of the United States of America took effect from the ninetieth day after the said day of deposit, namely, from the twenty-ninth day of October, one thousand nine hundred and thirty-four;

Proclamation.

NOW, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States of America, have caused the said convention and additional protocol to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States of America and the citizens thereof, subject to the reservation aforesaid.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the city of Washington this twenty-ninth day of October, in the year of our Lord one thousand nine hundred and
[SEAL] thirty-four, and of the Independence of the United States of America the one hundred and fifty-ninth.

FRANKLIN D ROOSEVELT

By the President:
WILLIAM PHILLIPS
Acting Secretary of State.

APPENDIX B

WARSAW CONVENTION (English Translation), 49 Stat. at 3014 *et seq.*

Translation

Multilateral Convention relating to international air transportation.

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

Contracting Powers.

THE PRESIDENT OF THE GERMAN REICH, THE FEDERAL PRESIDENT OF THE REPUBLIC OF AUSTRIA, HIS MAJESTY THE KING OF THE BELGIANS, THE PRESIDENT OF THE UNITED STATES OF BRAZIL, HIS MAJESTY THE KING OF THE BULGARIANS, THE PRESIDENT OF THE NATIONALIST GOVERNMENT OF CHINA, HIS MAJESTY THE KING OF DENMARK AND ICELAND, HIS MAJESTY THE KING OF EGYPT, HIS MAJESTY THE KING OF SPAIN, THE CHIEF OF STATE OF THE REPUBLIC OF ESTONIA, THE PRESIDENT OF THE REPUBLIC OF FINLAND, THE PRESIDENT OF THE FRENCH REPUBLIC, HIS MAJESTY THE KING OF GREAT BRITAIN, IRELAND, AND THE BRITISH DOMINIONS BEYOND THE SEAS, EMPEROR OF INDIA, THE PRESIDENT OF THE HELLENIC REPUBLIC, HIS MOST SERENE HIGHNESS THE REGENT OF THE KINGDOM OF HUNGARY, HIS MAJESTY THE KING OF ITALY, HIS MAJESTY THE EMPEROR OF JAPAN, THE PRESIDENT OF THE REPUBLIC OF LATVIA, HER ROYAL HIGHNESS THE GRAND DUCHESS OF LUXEMBURG, THE PRESIDENT OF THE UNITED MEXICAN STATES, HIS MAJESTY THE KING OF NORWAY, HER MAJESTY THE QUEEN OF THE NETHERLANDS, THE PRESIDENT OF THE REPUBLIC OF POLAND, HIS MAJESTY THE KING OF RUMANIA, HIS MAJESTY THE KING OF SWEDEN, THE SWISS FEDERAL COUNCIL, THE PRESIDENT OF THE CZECHOSLOVAK REPUBLIC, THE CENTRAL EXECUTIVE COMMITTEE OF THE UNION OF SOVIET SOCIALIST REPUBLICS, THE PRESIDENT OF THE UNITED STATES OF VENEZUELA, HIS MAJESTY THE KING OF YUGOSLAVIA:

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier,

Have nominated to this end their respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the following convention:

CHAPTER I. SCOPE—DEFINITIONS

Article 1

Scope.

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

Definitions.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 2

Application of convention.

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

Chapter II. Transportation Documents

Transportation documents.

SECTION I—PASSENGER TICKET

Article 3

Passenger ticket.

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

SECTION II.—BAGGAGE CHECK

Article 4

Baggage check.

(1) For the transportation of baggage, other than small personal objects of which the passenger takes charge himself, the carrier must deliver a baggage check.

(2) The baggage check shall be made out in duplicate, one part for the passenger and the other part for the carrier.

(3) The baggage check shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The name and address of the carrier or carriers;

(*d*) The number of the passenger ticket;

(*e*) A statement that delivery of the baggage will be made to the bearer of the baggage check;

(*f*) The number and weight of the packages;

(*g*) The amount of the value declared in accordance with article 22 (2);

(*h*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(4) The absence, irregularity, or loss of the baggage check shall not affect the existence or the validity of the contract of transportation which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to avail himself of those provisions of the convention which exclude or limit his liability.

SECTION III.—AIR WAYBILL

Article 5

Air waybill.

(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an "air waybill": every consignor has the right to require the carrier to accept this document.

(2) The absence, irregularity, or loss of this document shall not affect the existence or the validity of the contract of transportation which shall, subject to the provisions of article 9, be none the less governed by the rules of this convention.

Article 6

Requirements.

(1) The air waybill shall be made out by the consignor in three original parts and be handed over with the goods.

(2) The first part shall be marked "for the carrier", and shall be signed by the consignor. The second part shall be marked "for the consignee"; it shall be signed by the consignor and by the carrier and shall accompany the goods. The third part shall be signed by the carrier and handed by him to the consignor after the goods have been accepted.

(3) The carrier shall sign on acceptance of the goods.

(4) The signature of the carrier may be stamped; that of the consignor may be printed or stamped.

(5) If, at the request of the consignor, the carrier makes out the air waybill, he shall be deemed, subject to proof to the contrary, to have done so on behalf of the consignor.

Article 7

The carrier of goods has the right to require the consignor to make out separate waybills when there is more than one package.

Article 8

Contents.

The air waybill shall contain the following particulars:

(*a*) The place and date of its execution;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the consignor;

(*e*) The name and address of the first carrier;

(*f*) The name and address of the consignee, if the case so requires;

(*g*) The nature of the goods;

(*h*) The number of packages, the method of packing, and the particular marks or numbers upon them;

(*i*) The weight, the quantity, the volume, or dimensions of the goods;

(*j*) The apparent condition of the goods and of the packing;
(*k*) The freight, if it has been agreed upon, the date and place of payment, and the person who is to pay it;
(*l*) If the goods are sent for payment on delivery, the price of the goods, and, if the case so requires, the amount of the expenses incurred;
(*m*) The amount of the value declared in accordance with article 22 (2);
(*n*) The number of parts of the air waybill;
(*o*) The documents handed to the carrier to accompany the air waybill;
(*p*) The time fixed for the completion of the transportation and a brief note of the route to be followed, if these matters have been agreed upon;
(*q*) A statement that the transportation is subject to the rules relating to liability established by this convention

Article 9

Liabilities.

If the carrier accepts goods without an air waybill having been made out, or if the air waybill does not contain all the particulars set out in article 8 (*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability.

Article 10

Responsibility for correctness.

(1) The consignor shall be responsible for the correctness of the particulars and statements relating to the goods which he inserts in the air waybill.
(2) The consignor shall be liable for all damages suffered by the carrier or any other person by reason of the irregularity, incorrectness or incompleteness of the said particulars and statements.

Article 11

Prima facie evidence of contract.

(1) The air waybill shall be *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of transportation.
(2) The statements in the air waybill relating to the weight, dimensions, and packing of the goods, as well as those relating to the number of packages, shall be *prima facie* evidence of the facts stated; those relating to the quantity, volume, and condition of the goods shall not constitute evidence against the carrier except so far as they both have been, and are stated in the air waybill to have been, checked by him in the presence of the consignor, or relate to the apparent condition of the goods.

Article 12

Consignor's right to dispose of goods.

(1) Subject to his liability to carry out all his obligations under the contract of transportation, the consignor shall have the right to dispose of the goods by withdrawing them at the airport of departure or destination, or by stopping them in the course of the journey on any landing, or by calling for them to be delivered at the place of destination, or in the course of the journey to a person other than the consignee named in the air waybill, or by requiring them to be returned to the airport of departure. He must not exercise this right of disposition in such a way as to prejudice the carrier or other consignors, and he must repay any expenses occasioned by the exercise of this right.
(2) If it is impossible to carry out the orders of the consignor the carrier must so inform him forthwith.

(3) If the carrier obeys the orders of the consignor for the disposition of the goods without requiring the production of the part of the air waybill delivered to the latter, he will be liable, without prejudice to his right of recovery from the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air waybill.
(4) The right conferred on the consignor shall cease at the moment when that of the consignee begins in accordance with article 13, below. Nevertheless, if the consignee declines to accept the waybill or the goods, or if he cannot be communicated with, the consignor shall resume his right of disposition.

Article 13

Delivery of goods and waybill.

(1) Except in the circumstances set out in the preceding article, the consignee shall be entitled, on arrival of the goods at the place of destination, to require the carrier to hand over to him the air waybill and to deliver the goods to him, on payment of the charges due and on complying with the conditions of transportation set out in the air waybill.
(2) Unless it is otherwise agreed, it shall be the duty of the carrier to give notice to the consignee as soon as the goods arrive.
(3) If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee shall be entitled to put into force against the carrier the rights which flow from the contract of transportation.

Article 14

Enforcement of respective rights.

The consignor and the consignee can respectively enforce all the rights given them by articles 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligations imposed by the contract.

Article 15

Respective relationship.

(1) Articles 12, 13, and 14 shall not affect either the relations of the consignor and the consignee with each other or the relations of third parties whose rights are derived either from the consignor or from the consignee.

Variations in waybill.

(2) The provisions of articles 12, 13, and 14 can only be varied by express provision in the air waybill.

Article 16

Customs, etc., formalities.

(1) The consignor must furnish such information and attach to the air waybill such documents as are necessary to meet the formalities of customs, octroi, or police before the goods can be delivered to the consignee. The consignor shall be liable to the carrier for any damage occasioned by the absence, insufficiency, or irregularity of any such information or documents, unless the damage is due to the fault of the carrier or his agents.
(2) The carrier is under no obligation to enquire into the correctness or sufficiency of such information or documents.

Liability of carrier.

Chapter III. Liability of the Carrier

Article 17

Personal injuries, etc.

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Appendix B

Article 18

Checked baggage, etc.

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

Transportation delay.

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

Exemptions.

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

Contributory negligence.

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

Maximum liability.

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

[64019°—56—PT II——62

Appendix B

Article 23

Provision for relieving, etc., liability void.

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

Actions for certain damages.

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

Carrier's wilful misconduct.

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 26

Evidence of delivery in good condition.

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

In case of damage.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and, at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

Complaints in writing.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

Liability of estate of deceased person.

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

Article 28

Venue of action.

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted. Procedure.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped. Time limitation.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision. Transportation by successive carriers.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damage, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

Chapter IV. Provisions Relating to Combined Transportation

Combined transportation.

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1. Provisions relating to.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

Chapter V. General and Final Provisions

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28. General, etc., provisions.

Article 33

Rights of carriers to refuse, etc.

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Article 34

Transportation excluded from application of convention.

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

"Days" defined.

The expression "days" when used in this convention means current days, not working days.

Article 36

Deposit of original covenant; certified copies to be furnished.

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

Deposit of ratifications.

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

Effective dates, etc.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

Notification.

(3) It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the High Contracting Parties of the date on which this convention comes into force as well as the date of the deposit of each ratification.

Article 38

Adherence.

(1) This convention shall, after it has come into force, remain open for adherence by any state.

Notices to be given.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

Denunciations.

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Appendix B

Article 40

Colonies, protectorates, etc.; application of convention.

(1) Any High Contracting Party may, at the time of signature or of deposit of ratification or of adherence, declare that the acceptance which it gives to this convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

Article 41

Succeeding conferences.

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

Signatures.

This convention, done at Warsaw on October 12, 1929, shall remain open for signature until January 31, 1930.

For Germany:
R. RICHTER
Dr. A. WEGERDT
Dr. E. ALBRECHT
Dr. OTTO RIESE

For Austria:
STROBELE
REINOEHL

For Belgium:
BERNARD DE L'ESCAILLE

For the United States of Brazil:
ALCIBIADES PEÇANHA

For Bulgaria:

For China:

For Denmark:
L. INGERSLEV
KNUD GREGERSEN

For Egypt:

For Spain:
SILVIO FERNANDEZ-VALLIN

Appendix B

Signatures—Contd.

For Estonia:

For Finland:

For France:
PIERRE ÉTIENNE FLANDIN
GEORGES RIPERT

For Great Britain and Northern Ireland:
A. H. DENNIS
ORME CLARKE
R. L. MEGARRY

For the Commonwealth of Australia:
A. H. DENNIS
ORME CLARKE
R. L. MEGARRY

For the Union of South Africa:
A. H. DENNIS
ORME CLARKE
R. L. MEGARRY

For the Hellenic Republic:
G. C. LAGOUDAKIS

For Hungary:

For Italy:
A. GIANNINI

For Japan:
KAZUO NISHIKAWA

For Latvia.
M. NUKŠA

For Luxemburg:
E. ARENDT

For Mexico:

For Norway:
N. CHR. DITLEFF

For the Netherlands:
W. B. ENGELBRECHT

For Poland:
AUGUSTE ZALESKI
ALFONS KÜHN

For Rumania:
G. CRETZIANO

For Sweden:

For Switzerland:
EDM. PITTARD
Dr. F. HESS

Appendix B

Signatures—Contd.

For Czechoslovakia:
Dr. V. GIRSA

For the Union of Soviet Socialist Republics:
KOTZUBINSKY

For Venezuela:

For Yugoslavia:
IVO DE GIULLI

Additional Protocol

Additional Protocol.

With Reference to Article 2

Ante, p. 3001.

International transportation by State, etc.

The High Contracting Parties reserve to themselves the right to declare at the time of ratification or of adherence that the first paragraph of article 2 of this convention shall not apply to international transportation by air performed directly by the state, its colonies, protectorates, or mandated territories, or by any other territory under its sovereignty, suzerainty, or authority.

Signatures.

For Germany:
R. RICHTER
Dr. A. WEGERDT
Dr. E. ALBRECHT
Dr. OTTO RIESE

For Austria:
STROBELE
REINOEHL

For Belgium:
BERNARD DE L'ESCAILLE

For the United States of Brazil:
ALCIBIADES PEÇANHA

For Bulgaria:

For China:

For Denmark:
L. INGERSLEV
KNUD GREGERSEN

For Egypt:

For Spain:
SILVIO FERNANDEZ-VALLIN

For Estonia:

For Finland:

For France:
PIERRE ÉTIENNE FLANDIN
GEORGES RIPERT

Appendix B

Signatures—Contd.

For Great Britain and Northern Ireland:
A. H. DENNIS
ORME CLARKE
R. L. MEGARRY

For the Commonwealth of Australia:
A. H. DENNIS
ORME CLARKE
R. L. MEGARRY

For the Union of South Africa:
A. H. DENNIS
ORME CLARKE
R. L. MEGARRY

For the Hellenic Republic:
G. C. LAGOUDAKIS

For Hungary:

For Italy:
A. GIANNINI

For Japan:
KAZUO NISHIKAWA

For Latvia:
M. NUKŠA

For Luxemburg:
E. ARENDT

For Mexico:

For Norway:
N. CHR. DITLEFF

For the Netherlands:
W. B. ENGELBRECHT

For Poland:
AUGUSTE ZALESKI
ALFONS KÜHN

For Rumania:
G. CRETZIANO

For Sweden:

For Switzerland:
EDM. PITTARD
Dr. F. HESS

For Czechoslovakia:
Dr. V. GIRSA

For the Union of Soviet Socialist Republics:
KOTZUBINSKY

For Venezuela:

For Yugoslavia:
IVO DE GIULLI

APPENDIX C

Opinion of U.S. Court of Appeals, Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 233—September Term, 1976.

(Argued November 22, 1976 Decided April 26, 1977.)

Docket No. 76-7247

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants, et al.,

Plaintiffs-Appellees,

—against—

FORWOOD CLOUD WISER, JR. and RICHARD E. NEUMAN,

Defendants-Appellants.

Before:

MANSFIELD, VAN GRAAFEILAND and MESKILL,

Circuit Judges.

Interlocutory appeal, certified under 28 U.S.C. §1292(b), in a suit against airline officials for damages for personal injuries suffered in an international airplane disaster, from an order of the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge*, dismissing defendants' defense based on the liability limits of the Warsaw Convention as modified by the Montreal Agreement.

Reversed and remanded with instructions to reinstate the defense.

JOHN J. MARTIN, Esq., New York, N.Y. (Edward M. O'Brien, Esq., Bigham Englar Jones & Houston, New York, N.Y., of counsel), *for Defendants-Appellants.*

MELVIN I. FRIEDMAN, Esq., New York, N.Y. (Lee S. Kreindler, Esq., Milton G. Sincoff, Esq., Stanley J. Levy, Esq., James D. Veach, Esq., Kreindler & Kreindler, New York, N.Y., of counsel), *for Plaintiffs-Appellees.*

SPEISER & KRAUSE, P.C., New York, N.Y. (Charles F. Krause, Esq., Joseph Pierini, Esq., New York, N.Y., of counsel), *for Amicus Curiae Sotirios Karras, et al.*

MANSFIELD, *Circuit Judge:*

This case, arising out of an aircraft disaster on the high seas, presents the novel and important question of whether airline employees are entitled to assert as a defense the liability limitations of the Warsaw Convention ("the Convention"),[1] as modified by the Montreal Agreement.[2] We hold that employees are entitled to do so, and reverse and remand with instructions to reinstate the defense.

On September 8, 1974, Trans World Airlines ("TWA") Flight 841 from Tel Aviv to New York via Athens and

1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11 (adherence of United States proclaimed Oct. 29, 1934).

2 Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol, Agreement CAB 18990, approved by order E-28680, May 13, 1966 (docket 17325).

Rome crashed into the high seas some 50 nautical miles west of Cephalonia, Greece, killing all 79 passengers and 9 crew members on board. Under the Warsaw Convention, as modified by the Montreal Agreement, TWA would ordinarily be absolutely liable for the deaths of the 79 passengers, but its liability would be limited in amount to $75,000 per passenger unless plaintiffs could show willful misconduct. Instead of suing TWA, however, the administrators and executors in this case sued the President of the company and his Vice-President of Audit and Security in the United States District Court for the District of New Jersey, alleging that defendants were responsible for security on TWA flights and negligently failed to prevent the placing on board of a bomb which is alleged to have exploded and caused the disaster. Defendants denied negligence and also pleaded the liability limits of the Warsaw Convention as modified by the Montreal Agreement. On January 26, 1976, the Judicial Panel on Multidistrict Litigation transferred all federal court litigation arising out of the accident to Judge Frankel of the Southern District of New York. *In re Air Crash in the Ionian Sea,* 407 F. Supp. 238 (J.P.M.L. 1976). Plaintiffs moved to strike the defense of limited liability and Judge Frankel granted their motion, certifying to this court under 28 U.S.C. §1292(b) the question of whether these defendants are entitled to assert the Warsaw limits.

In a carefully considered opinion Judge Frankel, after finding the language of the Convention to be silent on the issue before him and gaining little light from its legislative history, pointed to several factors leading him to the conclusion that the Convention's liability limitations should not be extended to airline employees. In his view the deciding factors were the Convention's failure expressly to extend the limits to agents or employees even though agents were mentioned in some other respects, the fact

that limits were no longer needed to protect air travel as an infant industry, the strong policy against stipulations by carriers restricting tort liability based on the negligence of their employees, the criticism voiced of the Convention's limitations by some quarters in the United States, the Supreme Court's refusal to extend similar liability limitation provisions of the Carriage of Goods by Sea Act, 46 U.S.C. §1304(5), to stevedores or other agents, and the failure of the United States to ratify the so-called 1955 Hague Protocol, adopted by most of the Convention's signatories, which expressly extended the Convention's liability limits to a carrier's employees and agents acting within the scope of their employment. From this decision the TWA officer-defendants appeal.

Discussion

The question of whether an airline employee sued for damages for personal injuries suffered in an international airplane accident may invoke the Convention's liability limitations is of great importance to international air disaster litigation and, so far as we know, is here raised for the first time at the federal appellate level. The few American trial court decisions on the issue have split. Compare *Pierre* v. *Eastern Air Lines, Inc.,* 152 F. Supp. 486, 489 (D.N.J. 1957) (employees not protected), with *Chutter* v. *KLM Royal Dutch Airlines,* 132 F. Supp. 611, 613 (S.D. N.Y. 1955) (agents protected), and *Wanderer* v. *Sabena,* 1949 U.S. Aviation Rep. 25 (Sup. Ct. N.Y. Co. 1949) (agents protected). Although victims of international air disasters have hitherto almost without exception limited themselves to seeking redress from the airline company owning or operating the plane involved, or from the manufacturer of the plane, the pilot ordinarily may also be held liable for damages caused by his operation of the plane, either under

the common law doctrine of res ipsa loquitur[3] or the civil law doctrine that the person controlling the vehicle is absolutely liable for injuries resulting from an accident, regardless of the absence of fault or negligence.[4] Similarly, as in this case, other employees can often plausibly be alleged to have been negligent or otherwise responsible for the injuries. Should employees not be covered by the provisions of the Convention, the entire character of international air disaster litigation involving planes owned and operated by American airlines, would be radically changed. The liability limitations of the Convention could then be circumvented by the simple device of a suit against the pilot and/or other employees, which would force the American employer, if it had not already done so, to provide indemnity for higher recoveries as the price for service by employees who are essential to the continued operation of its airline. The increased cost would, of course, be passed on to passengers.

The most immediately relevant provisions of the Convention are Article 17 (imposing on the carrier liability for the death or injury of a passenger arising from an accident sustained on an aircraft), Article 22 (limiting the carrier's liability for each passenger to a fixed sum of francs) and Article 24 (providing that any action for damages under Article 17 is subject to the conditions and limits of the Convention). The pertinent portions of these Articles, in the official French text ratified by the Senate,

3 See *Smith* v. *O'Donnell*, 215 Cal. 714, 12 P.2d 933 (1932); *Seaman* v. *Curtiss Flying Serv., Inc.*, 231 App. Div. 867, 247 N.Y.S. 251 (1930); Lowenfeld, Aviation Law §4.32 (1972).

4 See, e.g., Civil Code art. 1384, para. 1 (Fr.); Judgment of Nov. 12, 1952, Cour d'appel, Paris, [1953] J.C.P. II 7650; Judgment of Oct. 11, 1954, Cour d'appel, Bordeaux, [1955] D. Jr. 32; Judgment of April 7, 1956, Cour d'appel, Paris, [1956] J.C.P. II 9453.

49 Stat. 3000,[5] and in an unofficial English translation used by the district court,[6] are as follows:

Article 17

French
(Official)

"Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement."

English
(Unofficial)

"The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Article 22

French
(Official)

"(1) Dans le transport des personnes, la responsabilité du transporteur envers chaque voyageur est limitée a la somme de cent vingt cinq mille francs. . . .

5 In order to ensure uniformity of interpretation, which was one of the paramount objectives of the Convention, the text was "drawn up in French in a single copy." Article 36. See *Block, supra* at 330; *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 33 n.7 (2d Cir. 1975); *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804, 814 (2d Cir. 1966).

6 The English version that was used by the Senate was originally published in a Treaty Information Bulletin of the Department of State in March 1934. 78 Cong. Rec. #115 77-82 (1934).

Appendix C.

Toutefois par une convention spéciale avec le transporteur le voyageur pourra fixer une limite de responsabilité plus élevée."

English
(Unofficial)

"In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. [In 1934, about $8,300]. . . . Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability."

Article 24

French
(Official)

"(1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.

"(2) Dans les cas prevus a l'article 17, s'appliquent egalement les dispositions de l'alinea precedent. . . ."

English
(Unofficial)

"(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

"(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply. . . ."

The foregoing provisions raise two important questions of interpretation bearing on the issue before us. The first is whether, in the absence of any definition of the term "transporteur" (carrier) used in the Convention, that term

Appendix C.

is limited to the corporate entity, in this case TWA, or was intended to embrace the group or community of persons actually performing the corporate entity's function. Although under the common law, as the district court noted, "the liability of the wrongdoing agent is a separate and clear source of redress, distinct from and logically prior to that of the principal," the Convention was intended to act as an international uniform law, see *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 337-38 (5th Cir. 1967), and therefore must be read in the context of the national legal systems of all of its members.[7] While we have not attempted to familiarize ourselves with the legal systems of the over 100 member states, it is clear that in at least some jurisdictions the language of Art. 22(1) would have the effect of limiting the liability of the carrier's employees as well as that of the carrier. As the author of the draft convention submitted to the conference at Warsaw, Professor Ambrosini of Italy, later stated:

"He had always thought that the Warsaw Convention regulated not only the liability of the carrier, but, at the same time, that of his servants or agents, and *especially for the simple reason that, in his opinion,*

---

7 As Judge Wisdom stated in *Block*, 386 F.2d at 331, "much of the difference in views among the jurists on Citeja and the delegates to Warsaw is attributable to the conceptual differences in the laws of France, Italy, Germany, and the Scandinavian countries, to say nothing of the difference between the civil law and the common law." He added:

"The binding meaning of the terms is the French legal meaning. 'The principle of the primacy of the French legal system thus means a harmonizing construction of the Convention.' This principle should not be carried to extremes, but '[u]niformity may be maintained without many futile disputes as to whether, why, and when resort to the teachings in Paris should be made.' The necessity for maintaining uniformity, even when the Convention is applied in a country, such as the United States, having a doctrinal basis for its legal system different from civilian systems, compels a broad construction of the Convention." *Id.* at 330.

the carrier and his servants or agents were, from the legal point of view, the same person. But the pilots had always sought a provision in this Convention which would clearly define their own legal situation which was reasonable and appropriate." (Emphasis added)

1 International Conference on Private Air Law, The Hague, September, 1955, Minutes 220 (ICAO Doc. 7686-LC/140 1956). Later Professor Ambrosini expanded on this interpretation:

> "As to the more general question whether the Warsaw Convention provided for the limitation of liability of the servants or agents, his opinion was that, under the general legislative and legal system, servants and agents, as the *longa manus* of their employer, would enjoy the same situation as the latter. From the legal point of view, there could not be a system whereby the carrier would be liable with limits and the servants and agents without limits."

Guadalajara Convention, 1 International Conference on Private Air Law, Guadalajara, August-September, 1961, Minutes, 134 (ICAO Doc. 8301-LC/149-1 1962). See also International Conference on Private Air Law, Guatemala City, Sept. 1961, Minutes 135 (remarks of the delegate from Norway: "From the logical point of view it was difficult to see why the legal situation of the servants and agents would not have to be like that of the carrier himself and be governed by the regime governing the contract of carriage. . . ."); 1 International Conference on Private Air Law, The Hague, Sept. 1955, Minutes 361 (ICAO Doc. 7686-LC/140 1946) (hereinafter cited as "Hague Minutes") (remarks of the delegate from the Philippines: "It was a cardinal principle of the law of principals and agents that

the liability of the agent was measured by the liability of the carrier himself under the rule that the liability of the principal was the one that governed."). We cannot, therefore, deem a purely common law reading of the language of Article 22(1) controlling.

A second problem of interpretation is that raised by the use of the word "cas" in Articles 17 and 24 of the official French text, *supra.* It will be noted that in the unofficial English translation used by the district court the word "cas" appearing in Article 17 is translated into "event" (i.e., "in the *event* of death or wounding of a passenger"), whereas the same word as used in Article 24(1) and (2) is translated into "cases" (i.e., "In the cases covered by article 17. . . ."). The latter translation is probably inaccurate for the reason that the word "cas" is not ordinarily used to refer to a lawsuit. Rather it means "event" or "case" in the nonjuridical sense. See J. Jeraute, Vocabulaire Français-Anglais et Anglais-Français de Termes et Locutions Juridiques 209, 302. Thus a less ambiguous rendition of Article 24 for our purposes might be:

> "(1) In the events anticipated in articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> "(2) In the events covered by article 17 the provisions of the preceding paragraph shall also apply, ..."

The expansive language of the official French version of Article 24 would therefore imply that the "conditions and limits set out in this convention" (including the 125,000 franc liability limit set by Article 22 and later increased to $75,000) apply to the present case, since (1) the suit

against the carrier's employees is an "action for damages, however founded" (Art. 24(1)) and (2) it seeks damages sustained "in the event of the death . . . of a passenger . . . on board the aircraft. . . ." (Art. 17). *Husserl* v. *Swiss Air Transport Co., Ltd.*, 388 F. Supp. 1238, 1245 (S.D.N.Y. 1975). That the authors of the Convention intended Article 24 to bar circumvention of the Article 22 liability limitations is further attested to by Professor H. Drion, Netherlands representative at the 1955 Hague Conference, who concluded:

> "It is believed that a sound interpretation, based on the spirit of Article 24 and not conflicting with its letter, leads to the conclusion that any action brought against the carrier's enterprise as such, or against members of it who can be considered part of the enterprise, are to be brought subject to the limits of Article 22. . . . Any other solution would defeat the purpose of Article 24, which is to prevent claimants from avoiding the provisions of the Convention by suing the enterprise outside the contract of carriage."

H. Drion, Limitation of Liabilities in International Air Law 158 (1954).

Although the legislative history of the Convention does not affirmatively or expressly support the foregoing interpretation, it contains nothing indicating a contrary intention. The most that can be said is that no discussion of the subject at issue here is to be found in the record of the two conferences—one in Paris in 1925 and the second in Warsaw in 1929—at which the text was drafted. Appellees' argument that the conferences, by referring the issue of the "legal status" of the captain of the aircraft and of the personnel to the International Technical Com-

mittee of Aerial Legal Experts (CITEJA), deliberately set aside the question of employee liability must be rejected. Examination of the draft produced by CITEJA shows that by "legal status" the members of the Warsaw and Paris conferences meant the power of the aircraft commander and the succession to that position by other aircraft personnel in the event of his inability to perform his duties. See 14 J. Air L. & Comm. 84 (1947).

Subsequent to the Convention's becoming effective, considerable controversy arose for the next 20 years over whether its liability limits applied to airline employees. A number of commentators took the position that the limits must be read to cover employees, pointing out that otherwise the purposes of the Convention could be completely circumvented. See H. Drion, Limitation of Liabilities in International Air Law 157 (1954) and authorities cited therein. Others opined that the Convention did not cover employee liability. See M. Kamminga, The Aircraft Commander in Commercial Air Transportation 90-92 (1953) and authorities cited therein. In part because of pressures by the Association of Airline Pilots for an amendment clarifying the issue, the question arose again at the International Conference on Private Air Law at The Hague in September 1955 ("the Hague Conference"), where the debate continued. The vast majority of delegates took no stand on the issue but simply concluded that an amendment clearly limiting the liability of airline employees was advisable, if only to resolve the controversy.[8] As the dele-

---

8 In recommending such an amendment, the Legal Committee of the International Civil Aviation Organization referred to

> "the possibility that efforts might be made by claimants to obtain from the carrier higher damages than those specified in the Convention by filing actions against the servant or agent of the carrier, upon the basis that no provision existed in the Convention limiting the liability of the servant or agent and upon the assumption that the carrier would indemnify such servants or agents."

gate from Belgium stated, without the amendment "the whole benefit of the Convention could be put aside." Hague Minutes at 218. Accordingly a clarifying amendment, Article 25A,[9] which expressly stated that the liability limits applied to a carrier's servants or agents, was introduced and overwhelmingly adopted. As H. K. Beaumont of CITEJA explained shortly after the conclusion of the Hague Conference:

> "The [Hague] Protocol includes an entirely new Article which has the effect of enabling a servant or agent, acting within the scope of his employment, to avail himself of the same limits of liability as those applicable to a carrier. Some experts have considered that the limits in Article 22 are already applicable to servants and agents, although the carrier alone is mentioned therein. Others contend that these limits are

Report on Revision of the Warsaw Convention, 2 International Conference on Private Air Law, The Hague, Sept. 1955, Documents 99 (ICAO Doc. 7686-LC/140 1956) (emphasis added). We read this statement as referring to continuing uncertainty as to the proper scope of the Convention. As the Swiss delegation stated:

> "Mr. Stalder (Switzerland) stated that the Swiss Delegation saw no necessity for amending the Convention by an Article 25A. However, in order to assist the court which would have to pass judgment on cases now carefully regulated by this article, he was prepared to accept it."

Hague Minutes at 216.

9 Article 25A provides:

> "1. If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.
>
> "2. The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.
>
> "3. The provisions of paragraphs 1 and 2 of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

> not applicable to servants or agents, who consequently can be sued separately in tort or delict without limit. In some cases, servants and agents are indemnified against such claims in their employment agreements. In such cases, the carrier, though himself not liable, might have to pay unlimited compensation on behalf of a servant or agent. The new Article 25A sets at rest doubts on this subject and regularizes the position."

Beaumont, The Warsaw Convention of 1929, as amended by the Protocol Signed at The Hague, on September 28, 1955, 22 J. Air L. & Comm. 414, 419 (1955).

In the present case the district court, while conceding that a debate had existed on the issue of whether the Convention's liability limits applied to a carrier's employees, nevertheless relied heavily upon the later refusal of the United States to ratify the Hague Protocol which contained, among other items, Article 25A. We believe this reliance on the part of the district court to be misplaced, since the refusal to ratify the Protocol was due to the United States' dissatisfaction with an entirely different aspect of the Protocol—its failure to provide a sufficient increase in the liability limits—rather than to its express application of these limits to a carrier's employees. The Warsaw Convention had limited the carrier's liability for each passenger to $8,300, to which the United States objected, Lowenfeld, Aviation Law, §4.11 (1972), announcing that it would not agree to a limit of less than $25,000. A large majority of the delegations, by contrast, favored a $13,300 limit. A compromise was finally reached at $16,600, exactly double the Warsaw figure.

Although the United States signed the Hague Protocol, 10 years went by without the President of the United States or the Senate Foreign Relations Committee taking

any firm stand on ratification. When a new Administration, many years later, recommended ratification coupled with domestic legislation requiring all American airlines to purchase insurance in the amount of $50,000 for each passenger in case of death, the plaintiffs' bar, airlines and insurance companies opposed the insurance aspect of the proposal. The situation was summarized by Najeeb Halaby, Administrator of the Federal Aviation Agency:

> "[T]here are a lot of benefits in the Hague Protocol that are submerged in the discussion of the limitation of liability. . . . *We like just about everything about the Hague Protocol except the doubling of the liability figure.*
>
> . . . .
>
> "The central defect in the Warsaw Convention is its low limit of liability. Opponents of the Warsaw system contend that the defect would exist even under its amendment by the Hague Protocol. However, it was our judgment that we should not forsake the major benefits of the Warsaw Convention solely on account of this defect but rather should strive to retain these benefits and at the same time alleviate to the extent possible the adverse impact of the monetary limitation." (Emphasis added)

Hague Protocol to Warsaw Convention: Hearings Before the Committee on Foreign Relations, 89th Cong., 1st Sess. on Exec. H., 86th Cong., 1st Sess. at 15, 19 (May 26-27, 1965) (hereinafter cited as "Hague Hearings"). The Committee recommended ratification, but only if the insurance legislation was enacted. S. Exec. Rep. No. 3, 89th Cong., 1st Sess. 6-7 (1965). When it became evident that the insurance legislation stood no chance of passage, the Administration unsuccessfully attempted to induce the carriers to waive the liability limitation up to $100,000 under Article 22(1), which provides that "by special contract, the carrier and the passenger may agree to a higher limit of liability." Thereupon the United States gave formal notice of denunciation of the Convention, to become effective in six months time, but left open the possibility that it might be withdrawn if an interim waiver of liability limitations up to $75,000 per passenger were forthcoming from the airlines, pending a full-scale revision of the limits by international agreement up to $100,000.

At this point a conference was convened in Montreal to see if an acceptable compromise could be worked out. Intensive private negotiations led on Friday, May 13, 1966, to the withdrawal of the notice of denunciation and the execution of an agreement, known as the Montreal Agreement, which provided for absolute carrier liability up to $75,000 on all flights into or out of the United States. In all, over 150 carriers subscribed. See Lowenfeld, Aviation Law §§5.41-5.42 (1972). The Hague Protocol was never resubmitted to the Senate for ratification.[10]

As the somewhat convoluted history of attempted ratification of the Hague Protocol makes clear, the only reason for the United States' refusal to ratify it was its dissatisfaction with the low level of the carriers' liability limitations, not the other provisions of the Protocol. Indeed, the administration and the members of the Senate Foreign Relations Committee were willing to compromise on the carriers' liability limits in order to obtain the benefits of the remainder of the Protocol, including Article 25A, which the United States delegation had endorsed at the Hague Conference.

---

10 A detailed history of the Hague ratification controversy appears in Lowenfeld, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497 (1967). Mr. Lowenfeld was Chairman of the United States delegation at the Montreal Conference.

Thus the plain language of the original Convention, read according to the meaning that would ordinarily be given to the pertinent official French-language text, tends to support appellants' contention that its liability limits were intended to apply to a carrier's employees, with little or no further light on the issue being contributed by its legislative history, subsequent events, or decided cases.[11] That

11 To the extent that the decided cases indicate anything, they would tend to support, on balance, the conclusion that employees should be covered. In *Wanderer* v. *Sabena*, 1949 U.S. Aviation Rep. 25 (Sup. Ct. N.Y. Co. 1949), the court held that agents were protected by the liability limits. Following *Wanderer*, the court in *Chutter* v. *KLM*, 132 F. Supp. 611 (S.D.N.Y. 1955), also held that the Convention protects agents. In 1957, the court in *Pierre* v. *Eastern Airlines, Inc.*, 152 F. Supp. 486 (D.N.J. 1957), apparently unaware of *Wanderer* and *Chutter* and relying on the failure of this country to ratify the Hague Protocol, held that the defendant pilot was not protected even though his co-defendant and employer Eastern Airlines was. The ultimate disposition of this case was unclear. (Appellants assert that the case was not appealed and was settled for a nominal amount. Amicus asserts that the nominal sum was greater than that permitted by the Convention.) In 1961, a Canadian trial court ruled that the Carriage by Air Act, which embodied the Warsaw Convention in Canada, did not limit the liability of the estates of employee-pilots. *Stratton* v. *Trans Canada Airlines*, 27 D.L.R.2d 670 (B.C. Sup. Ct. 1961). The Court of Appeals held that the flight was not "international" for purposes of the Convention, so that the limitations of the Convention did not apply, and that in any event any cause of action against the pilots did not survive their deaths, and therefore concluded that "it is not necessary to consider whether the pilots would have been entitled to its benefits had it been applicable to the flight in question." *Stratton* v. *Trans Canada Airlines*, 32 D.L.R.2d 736, 749 (B.C. Ct. App. 1962).

The parties and amicus curiae cite in addition *Scarf* v. *Trans World Airlines, Inc.*, 4 Av. L. Rep. (CCH) 17, 828 (S.D.N.Y. 1955); *Hoffman* v. *British Overseas Airways Corp.*, 9 Av. L. Rep. (CCH) 17,180 (N.Y. Sup. Ct. 1964); and Judgment of Dec. 3, 1969, Cass. Crim., France [1970] D.S. Jur. 81. In *Scarf*, no allegations of agency were made, and the court distinguished *Chutter* on that basis. In *Hoffman*, the court refused to dismiss for improper venue a suit against an airport portable stairway company where the company refused to concede jurisdiction over the claim in any other court, distinguishing *Chutter* as not dealing with venue problems. Why amicus curiae cites the French case, *Judgment of Dec. 3, 1969*, in support of its position is something of a mystery, since France ratified the Hague Protocol prior to that decision.

interpretation, moreover, although not necessarily according with common law principles, which separate the corporation and its employees for liability purposes, does reflect the legal principles of many civil law states, which treat the corporation and its employees as one.

There remains the question of whether the overall purposes of the Convention shed any light on the meaning to be given to the pertinent provisions before us, for it is fundamental that a treaty, whether construed strictly or liberally, should be interpreted to effectuate its evident purposes. *Bacardi Corp.* v. *Domenech*, 311 U.S. 150, 163 (1940); *Factor* v. *Laubenheimer*, 290 U.S. 276, 293-94 (1933); *United States* v. *A.L. Burbank & Co.*, 525 F.2d 9, 12-14 (2d Cir. 1975); *Board of County Commissioners* v. *Aerolineas Peruanasa, S.A.*, 307 F.2d 802, 806-07 (5th Cir. 1962). In interpreting the Warsaw Convention, we have consistently followed this basic principle. In *Eck* v. *United Arab Airlines, Inc.*, 360 F.2d 804, 812 (2d Cir. 1966), for instance, we laid down general guidelines for the interpretation of the Convention, stating:

> "A court faced with this problem of interpretation, or another problem like it, can well begin with an inquiry into the purpose of the provision that requires inter-

In any event, the case involved the jurisdictional peculiarities of the French *action civile*, in which criminal and civil liabilities are assessed simultaneously against an alleged wrongdoer—in this case the pilot. The court upheld a motion to dismiss the adjoined suit against the employer carrier for lack of venue under the Warsaw Convention. No motion was made to dismiss the civil half of the *action civile*, and no consideration was given by the court to problems that might be involved in doing so.

Thus, with the possible exception of *Pierre*, to our knowledge there has never, during the entire 40-odd years of the Convention, been a Warsaw case in any country in which a plaintiff has obtained, by suing the carrier's employees instead of the carrier itself, more than the sum for which the carrier itself would be liable under the Convention as modified by applicable protocols and agreements.

pretation. The language of the provision that is to be interpreted is, of course, highly relevant to this inquiry but it should never become a 'verbal prison.' Other considerations, such as the court's sense of the conditions that existed when the language of the provision was adopted, its awareness of the mischief the provision was meant to remedy, and the legislative history available to it, are also relevant as the court attempts to discern and articulate the provision's purpose. The inquiry may lead the court to conclude that the provision's language accurately reflected its purpose; in such a situation the court is most faithful to the purpose if the language is interpreted literally. Conversely, the inquiry may lead the court to conclude that the language of the provision only imperfectly manifests its purpose, or that when the words were first chosen the language accurately reflected the provision's purpose but that today the same words imperfectly reflect this purpose because conditions have changed in the area to which the words of the provision refer. It would be inconsistent with the 'wise counsel to reject "the tyranny of literalness,"' if the court in the latter situations did not seek to interpret the provision so as to effectuate its purpose, even if this requires departing in some measure from the letter and reading the language in a practical rather than literal fashion." (Citations omitted).

See also *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 36-37 (2d Cir. 1975); *Lisi* v. *Alitalia-Linee Aeree Italiana*, 370 F.2d 508, 512 (2d Cir. 1966), *aff'd by divided court*, 390 U.S. 455, *rehearing denied*, 391 U.S. 929 (1968); *Noel* v. *Linea Aeropostal Venezolana*, 247 F.2d 677, 679 (2d Cir.), *cert. denied*, 355 U.S. 907 (1957); *Block* v. *Compagnie Nationale Air France*, 386 F.2d 323, 336-37 (5th

Cir. 1967), adopted and followed in *Molitch* v. *Irish International Airlines*, 436 F.2d 42, 43 (2d Cir. 1970).

It is beyond dispute that the purpose of the liability limitation prescribed by Article 22 was to fix at a definite level *the cost to airlines* of damages sustained by their passengers and of insurance to cover such damages. As Secretary of State Cordell Hull wrote in transmitting the Convention to the Senate in 1934:

> "It is believed that the principle of limitation of liability will not only be beneficial to passengers and shippers as affording a more definite basis of recovery and as tending to lessen litigation, but that it will prove to be an aid in the development of international air transportation, as such limitation will afford the carrier a more definite basis on which to obtain insurance rates, with the probable result that there would eventually be a reduction of operating expenses for the carrier and advantages to travelers and shippers in the way of reduced transportation charges."

Senate Comm. on Foreign Relations, Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules, Sen. Exec. Doc. No. G, 73d Cong., 2d Sess. 3-4 (1934).

The history of the Convention from the point of adherence by the United States to the present indicates no change in this fundamental purpose. It is true that as the airline industry has matured, safety records have improved and world-wide inflation has advanced, an increase in the amount of the limit has been required. Thus the Administration in 1965 proposed compulsory insurance in the amount of $50,000, and the Montreal Agreement raised the limits of liability to $75,000. Similarly, the Guatemala City Protocol, drafted at the insistence of the United

States and still awaiting consideration by the Senate, would raise those limits (at the current exchange rate) to over $400,000.[12] Nevertheless, at no time has this country ever abandoned the basic principle that, whatever the limits may be, air carriers should be protected from having to pay out more than a fixed and definite sum for passenger injuries sustained in international air disasters.[13]

To permit a suit for an unlimited amount of damages against a carrier's employees for personal injuries to a passenger would unquestionably undermine this purpose behind Article 22, since it would permit plaintiffs to recover from the carrier through its employees damages in excess of the Convention's limits. This impact was recognized by Professor Drion prior to the Hague Conference when he urged that the interpretation presently sought by appellants be given to the Warsaw provisions:

> "Any other solution would defeat the purpose of Article 24, which is to prevent claimants from avoiding the provisions of the Convention by suing the enterprise outside the contract of carriage."

H. Drion, Limitation of Liabilities in International Air Law 158 (1954). Virtually all delegates, whatever view they took on the question of whether the liability limits of the Warsaw Convention applied to a carrier's employees, agreed that unless the limits applied the Convention's pertinent provisions would be frustrated. See,

12 In 1971 the Guatemala City Protocol instituted a system of absolute carrier liability regardless of fault, and raised the liability limits to about $100,000 at the then-current exchange rate of $35 per ounce of gold. (Under the Protocol, calculation of the limit is to be made "according to the gold value of [the dollar] at the date of the judgment." See Article VIII). As of March 22, 1977, the price of gold was $152 per ounce, which, according to our calculations, implies a liability limit of $480,147.

13 Except, of course, in the event of proof of "wilful conduct." Article 25.

e.g., Hague Minutes 218 (remarks of delegate from Greece), 218-19 (remarks of delegate from Canada), 219 (remarks of delegate from Spain), 353 (remarks of delegate from the United States), 360 (remarks of delegate from Australia). See also *id.* at 216 (remarks of delegate from Mexico), 218 (remarks of delegate from Belgium), 200 (remarks of delegate from Italy, Prof. Ambrosini), 221 (remarks of delegate from Portugal), 353 (remarks of delegate from the Netherlands, Prof. Drion), 361 (remarks of delegate from the United Kingdom), 361 (remarks of delegate from the Federal Republic of Germany, Prof. Riese).

Most carriers, at their employees' insistence, provide their employees with indemnity protection. The pressure for indemnification is attributable principally to the difficulty confronted by certain employees, such as pilots or their estates, in defending against personal liability, regardless of the amount claimed, in view of the common law presumption of liability created by the doctrine of res ipsa loquitur, see Lowenfeld, Aviation Law §4.32, at VI-100 (1972), and the imposition of absolute liability under certain civil law systems.[14] It is inconceivable that airlines could long operate without reimbursing their employees for this cost of doing business.[15]

Faced with indemnification as a modern-day reality, our function, in the absence of proof that the language of Articles 22 and 24 was not intended to apply to a carrier's

14 See note 4, *supra*. Thus the estate of the pilot of the Douglas DC-10 that crashed shortly after takeoff from Paris, France, on March 3, 1974, see *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975), would be absolutely liable for the death of all 333 passengers on board, despite the pilot's lack of negligence or fault.

15 Here, plaintiffs demand a total of $8,600,000 on behalf of 9 out of the 79 passengers on board. As the amicus brief notes, the case on appeal is the test case for the remainder of the suits consolidated with it below.

employees, should be to interpret these provisions in a manner that will carry out the framers' intent. As we stated in *Day* v. *Trans World Airlines, Inc., supra,* at 35:

> "Those called upon to construe a treaty should, in the words of Judge Clark, strive to 'give the specific words of a treaty a meaning consistent with the genuine shared expectations of the contracting parties.' Maximov v. United States, 299 F.2d 565, 568 (2d Cir. 1962), aff'd 373 U.S. 49, 83 S.Ct. 1054, 10 L.Ed.2d 184 (1963). These expectations can, of course, change over time. Conditions and new methods may arise not present at the precise moment of drafting. For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787. Justice Holmes' counsel concerning Constitutional construction, set forth in his opinion in Missouri v. Holland, 252 U.S. 416, 433, 40 S.Ct. 382, 383, 64 L.Ed. 641 (1920) applies with equal force to the task of treaty interpretation: '[W]hen we are dealing with words that are a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters.' "

Another fundamental purpose of the signatories to the Warsaw Convention, which is entitled to great weight in interpreting that pact, was their desire to establish a uniform body of world-wide liability rules to govern international aviation,[16] which would supersede with respect to

16 The preface to the Convention states that the parties "Having recognized the advantage of regulating in a uniform manner the conditions on international transportation by air in respect of the documents used for such transportation and of the liability of the carrier" have entered into the Convention thereafter set forth. See also *Grein*

international flights the scores of differing domestic laws, leaving the latter applicable only to the internal flights of each of the countries involved.[17] As Administrator Halaby of the FAA later stated before the Senate Foreign Relations Committee:

> "The problem of finding one's way through this thicket of foreign laws would be extremely difficult for the individual, passenger, or shipper, an even greater problem for the large manufacturing company with many air shipments to different parts of the world, and an almost insuperable task for the airline which has to operate in or over great numbers of countries whose laws are foreign to that of its flag. The Warsaw Convention, by providing a uniform rule of law which governs the relationship of the airline operator and his passenger or shipper in all of these different situations has for almost 40 years provided a degree of certainty making it possible for the individual passenger or shipper and the airline operator to be reasonably certain what their legal relationship with each other is, and to act accordingly. We believe it of great importance to retain this uniformity by ratifying the Hague Protocol rather than denouncing the Warsaw Convention and subjecting our passengers, shippers, and airlines to the risks of widely varying local laws."

v. *Imperial Airways, Ltd.*, [1937] 1 K.B. 50, 74-75; *Rosman* v. *Trans World Airlines, Inc.*, 34 N.Y.2d 385, 395-96 (1974); W.E. Astle, Air Carriers' Cargo Liabilities and Immunities 20 (London 1958); Warsaw Minutes at 136 (statement of the delegate from France).

17 See Letter of June 30, 1925, from M. Briand, Ministre des Affaires Étrangères, reprinted in Conférence Internationale de Droit Privé Aérien 1929 (Warsaw Proceedings) at 10. See also Avant-Projet de Convention Internationale sur la Responsabilité du Transporteur par Aéronefs, reprinted *id.* at 10-11.

Hague Hearings at 20. A May 26, 1965, letter from the Civil Aeronautics Board to the Committee reflected the same sentiment:

> "The major benefits of the [Warsaw] convention to passengers, shippers and carriers arise from the creation of a uniform body of substantive aviation liability law, applicable regardless of the place of injury, domicile of the passenger or shipper, or the nationality of the airline involved. Not only are the rights of recovery for passengers in the event of personal injury or death both assured and provided for in the convention, but the convention contains numerous provisions defining the respective rights of the consignor, consignee and carrier of air cargo, the legal effect of the air waybill, and provision for liability of the initial carrier in situations where the goods are shipped by several carriers. These provisions of substantive law are applicable to all claims wherever and however brought, and protect the claimant from provisions of foreign law or exemplary clauses in the ticket which tend to relieve the carrier from liability, fix a lower limit of liability from that provided for in the convention, or otherwise infringe upon the rules laid down by the convention.
>
> "In the absence of the convention, a claimant could be subject to a maze of conflicting principles of conflicts of laws. The discovery and proof of appropriate law to be applied in cases where accidents occur in foreign jurisdictions presents one of the most difficult problems lawyers must face."

Hague Hearings at 42.

Today, as aircraft have grown larger and international transportation more commonplace, problems inherent when-

ever the uniform provisions of the Convention do not apply have grown manyfold. A good example of the "judicial nightmare," *Forsyth* v. *Cessna Aircraft Co.*, 520 F.2d 608 (9th Cir. 1975), that could result is *In re Paris Air Crash of March 3, 1974*, 399 F. Supp. 732 (C.D. Cal. 1975), involving 203 suits by 337 decedents primarily against the aircraft manufacturer for defective design, arising out of the crash of an American-built plane owned by Turkish Air Lines shortly after takeoff in France.[18]

---

18 The court stated:

> "The decedents were from 24 countries, and at least 12 states of the United States were represented among the suits filed—a total of 36 jurisdictions. According to information furnished voluntarily by THY, the human occupants of the plane came from the following countries: Argentina, Australia, Belgium, Brazil, Canada, Cyprus, Denmark, England (United Kingdom), France, India, Northern Ireland (United Kingdom), Republic of Ireland, Italy, Japan, Morocco, New Zealand, North Korea, Pakistan, Senegal, South Viet Nam, Switzerland, Turkey, United States, and West Germany. (Claimants are from all of these countries plus Israel and Sweden.) So far, it presently appears to the Court that claimants are from the states of California, Indiana, Kansas, Maryland, New Jersey, New York, Pennsylvania, South Carolina, Texas, Utah, Virginia, and Washington. How many countries are actually involved as to either claimants or decedents neither the Court nor his staff has had time to tabulate, and accurate and complete information has not been supplied to the Court by the parties.
>
> . . . .
>
> "The complexity of the problem of the choice of law applicable to damages is further illustrated by some facets of the distinctions in the conflicts rules of the 12 states listed above: Five of them use the 'significant contacts' (state-with-substantial-ties-to-a-transaction) approach, sometimes interchangeably with 'government-interest' or 'public-interest' approach; six apply the 'place-of-the-wrong,' i.e. accident, approach; and California specifically uses the 'governmental-interest' approach. . . .
>
> "The measures of damages recoverable also varies: One state limits the amount to $50,000; another, to $75,000; four allow full recovery with varying limitations; one has full recovery plus pain and suffering and mental anguish; and five use 'compensatory' and, in some instance, 'pecuniary.'
>
> "No standard or rules for choice of law on damages (where

Appendix C.

Confronted with the prospect of a jungle-like chaos unless a uniform system of liability rules governing fundamental aspects of international air disaster litigation was devised, the framers of the Convention proceeded to draft a treaty which laid down uniform rules as to venue (Article 28), burden of proof (Article 20), standards of negligence (Articles 20 & 25), presumptions (Articles 18(3) & 26), contractual liability limitations (Article 23), suits against the estate of the tortfeasor (Article 27), statute of limitations (Article 29), liability in the event of carriage by more than one carrier (Article 30), and damage awards (Articles 22 & 25). In the five instances where the law of the forum is to apply, the rules so state explicitly. See Sundberg, Air Charter: A Study in Legal Development 242 (Stockholm 1961); Article 21 (contributory negligence), Article 24(2) (standing of and allocation among survivors), Article 25 (fault equivalent to *dol*), Article 28 (procedure), and Article 29 (running of the statute of limitations).

The district court's decision, forsaking one uniform rule governing the limits of employee liability, would raise the very real prospect that in future international air disaster cases the plaintiffs would seek to circumvent the Convention's limitation by bringing suit against the pilot or some other employee of the airline involved, thus requiring the court to determine what domestic law applies and whether under that law recovery might be had for an amount greater than that recoverable against the airline. Indeed, in one lawsuit just commenced in New York seeking $4.5 million for the death of a passenger killed in the recent collision of

---

there may be a conflict) of any of the foreign nations involved has been cited to the court by the parties, and none has been found on independent research, although the parties have set forth the elements of the measure of damages in death cases in some, but by no means all, of the countries involved."

399 F. Supp. at 741-42.

Appendix C.

two Boeing 747 planes in the Canary Islands, the plaintiffs have taken the cue from the district court's decision here and joined one of the pilots as a co-defendant. If this method of circumventing the Convention's liability limitation is accepted, not only will the purpose of defining the limits of the carrier's obligations be circumvented, but in the process the Convention's most fundamental objective of providing a uniform system of liability and litigation rules for international air disasters will be abandoned as well. It is difficult to imagine an interpretation more at odds with the acknowledged purposes of the Convention than that for which appellees press. We believe, on the other hand, that a construction of the language of Article 22(1) and 24 which extends the Convention's liability limitation to passenger claims against employees not only reflects the plain meaning and purpose of the French text of these articles but accomplishes all of the Convention's objectives.

We find no merit in the remaining arguments advanced in support of the district court's interpretation of the liability limitation provisions of the Convention. The fact that the Convention in a few places refers not only to the carrier but to its agents is not inconsistent with our interpretation of Article 24(1), which, referring neither to a carrier nor to its agents, applies the limits without any qualification to "any action for damages, however founded." The Supreme Court's decision in *Robert C. Herd & Co.* v. *Krawill Machinery Corp.*, 359 U.S. 279 (1959), holding that §4(5) of the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. §1304(5), which limits the liability of an ocean carrier to $500 per package of cargo in the absence of a stated value in the bill of lading, does not limit the liability of an independent stevedoring company, is clearly distinguishable. COGSA, unlike the Convention, explicitly defines the term "carrier," and its definition does not include independent stevedoring companies. 46 U.S.C. §1301(a).

Moreover, COGSA, unlike the Convention, must be read against the common law and contains no requirement that "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention." In addition, there is no evidence that carriers governed by COGSA (unlike those governed by the Convention) are ever called upon to reimburse independent stevedoring companies for the negligence of the stevedoring companies' employees. The Court's interpretation of COGSA, therefore, unlike the interpretation of the Convention that appellees request here, operates in no way as a circumvention of carrier liability limits. Finally, *Herd* did not reverse a 40-year international course of practice, as appellees would have us do here. We therefore find the analogy unpersuasive.

Appellees argue that the Convention should not be enforced because it is now antiquated, pointing out that the airline industry is no longer in its infancy or "in need of special protection," that the $75,000 limit is "unconscionably low," that it is "arbitrary and inadequate," that "Warsaw is not vital to our foreign policy," and that "[a]s for the diplomatic problems that might be encountered, they can easily be overcome." [19] These arguments misconceive

19 In addition, the district court argued that the Convention ought to be strictly construed because adherence by the United States was not "prompt," "enthusiastic," or "exuberant." Under the same principle, presumably, a statute that barely passed Congress would be strictly construed, while a bill passed by a wide majority would deserve an expansive interpretation. We cannot endorse any such principle. As the Supreme Court stated in *Chicago, Burlington & Quincy R.R. Co.* v. *McGuire*, 219 U.S. 549, 569 (1911) (emphasis added):

> "Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and *the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance.*"

our function. We do not sit to decide whether laws are no longer necessary or to assess the diplomatic consequences of their abandonment. The Warsaw Convention is not a treaty that has mouldered on the books. On the contrary it has had agonizing reappraisal by the Executive and Legislative branches, without any denunciation on the part of the Executive branch or modification by Congress through adoption of superseding domestic laws, see *Diggs* v. *Shultz*, 470 F.2d 461, 466 (D.C. Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). Our duty is to enforce the Constitution, laws, and treaties of the United States, whatever they might be, and until one of our sister branches declares otherwise, the Warsaw Convention remains the supreme law of the land. *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971).

Accordingly, we hold that plaintiffs may not recover from an air carrier's employees or from the carrier and its employees together a sum greater than that recoverable in a suit against the carrier itself as limited by the Warsaw Convention with its applicable agreements and protocols. The order of the district court is reversed with instructions to reinstate defendants' defense based on that Convention.

APPENDIX D

Judgment of U.S. Court of Appeals, Second Circuit.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of April, one thousand nine hundred and seventy-seven.

Present: HON. WALTER R. MANSFIELD
HON. ELLSWORTH A. VANGRAAFEILAND
HON. THOMAS J. MESKILL
Circuit Judges,

76-7247

Ruth Ann Reed, as Administratrix of the Estate of Dan William Reed, deceased, and as parent, natural guardian, and best friend of Cynthia Ann Reed, Debora Lynn Reed and Julie Marie Reed, all infants, et al.,

Plaintiffs-Appellees,

v.

Forwood Cloud Wiser, Jr., and Richard E. Neuman,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix D

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and the action be and it hereby is remanded to said district court with instructions to reinstate the defense in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO
Clerk

by ARTHUR HELLER
Arthur Heller
Deputy Clerk

APPENDIX E

Order of U.S. Court of Appeals, Second Circuit Denying a Petition for a Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of June, one thousand nine hundred and seventy-seven.

Present: HON. WALTER R. MANSFIELD,
HON. ELLSWORTH A. VANGRAAFEILAND,
HON. THOMAS J. MESKILL,
Circuit Judges.

76-7247

Ruth Ann Reed, as Administratrix of the Estate of Dan William Reed, deceased, and as parent, natural guardian, and best friend of Cynthia Ann Reed, all infants, et al.,

Plaintiffs-Appellees,

v.

Forwood Cloud Wiser, Jr., and Richard E. Neuman,

Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellees,
Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

APPENDIX F

Opinion of U.S. District Court, Southern District of New York.

Reed v. Wiser
Cite as 414 F.Supp. 863 (1976)

OPINION

FRANKEL, District Judge.

On September 8, 1974, Trans World Airlines ("TWA") Flight 841, en route from Athens, Greece,[1] and bound for the John F. Kennedy Airport in New York City, crashed in the Ionian Sea, approximately 100 miles west of Araxos, Greece. All persons aboard were killed. The crash has given rise to a number of suits here and in other federal courts, all of which are now in this court for pretrial purposes pursuant to a ruling of the Multidistrict Litigation Panel.

The instant action was brought in New Jersey, and transferred to this district, by the personal representatives, heirs, and next of kin of nine of the passengers who died in the crash. Named as the only defendants are the President and the Staff Vice President in charge of Audit and Security of TWA. The complaint alleges that the crash was due to the explosion of a bomb aboard the aircraft shortly after the takeoff from Athens. Further, it is alleged that the defendants, in their respective capacities at TWA, were responsible for the institution and maintenance of a security system sufficient to prevent placing of explosives on the aircraft, and that defendants' negligent failure to institute or maintain a satisfactory security system was the proximate cause of the disaster.

Defendants have interposed as a second affirmative defense the assertion that damages are limited to $75,000 for

1. The flight had originated in Tel Aviv, Israel.

Appendix F

each decedent by the terms of the Warsaw Convention,[2] as supplemented by the Montreal Agreement.[3] Plaintiffs now move for an order, pursuant to Fed.R.Civ.P. 12(f), striking this second affirmative defense or, alternatively, for partial summary judgment under Rule 56.

The question thus raised is whether the Warsaw Convention's limitation of liability provisions are applicable to defendants, as employees of TWA, should they eventually be found liable.

2. The Warsaw Convention is officially denominated "Convention for the Unification of Certain Rules Relating to International Transportation by Air." Concluded at Warsaw on October 12, 1929, the Convention is reproduced (in an English translation of the official French version) at 49 Stat. 3000 (1934). The Convention was the result of two international conferences, one held in Paris in 1925 and the second in Warsaw in 1929, and of the work done by the interim Comité International Technique d'Experts Juridique Aeriens ("CITEJA"). See generally Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.)*, 3 J. Air. L. & Comm. 27 (1932). The United States, which had not participated in the work of CITEJA, and had observed, but not participated in, the Warsaw Conference, proclaimed adherence to the treaty in 1934. 78 Cong.Rec. 11,582 (1934) (Congressional approval); T.S. No. 876, 49 Stat. 3000 (1934).

3. The Montreal Convention is officially denominated "Agreement Relating to Liability Limitation of the Warsaw Convention and the Hague Protocol," signed May 13, 1966. The motivating force was "a torrent of criticism of the stringent Warsaw limitations of liability," *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 36 (2d Cir. 1975), which had held liability to $8,300 and provided the carriers with a defense of due care. *Id.* The State Department filed, on November 15, 1965, a formal notice of denunciation of the Warsaw treaty, to take effect six months later unless the principal international air carriers agreed to raise their liability ceiling, 50 Dept. State Bull. 923 (1965). The result of the Montreal Convention, which was accepted by the State Department, 54 Dept. State Bull. 955-57 (1966), was to raise the limit of liability to $75,000, including costs of litigation (or $58,000 plus costs of litigation in jurisdictions where there are provisions for separate awards of such costs), without regard to fault on the part of the carrier.

Appendix F

Article 17 of the Warsaw Convention states:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

Article 22, as modified by the Montreal Agreement, provides:

> "In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of [$75,000]."

Thus the relevant question, more precisely put, is whether the term "carrier" refers only to the corporate or other owning entity as such, here TWA, or also includes the employees and agents acting on the carrier's behalf.

[1] The question has been ably and exhaustively briefed. It is by no means susceptible of a clear and entirely confident answer. It is answered here, for reasons which follow, in plaintiffs' favor.

1. The inquiry begins, though it cannot end, with the language of the treaty and its drafting history. See *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 33, 34 (2d Cir. 1975); McNair, *The Law of Treaties* 411-23 (1961). The Convention contains no definition of "carrier." Plaintiffs derive some textual support, if not a compelling argument, from the fact that the treaty language includes separate, distinguishing references to carriers and their agents.[4] There is no indication, however, of deliberate at-

4. See e. g., Article 20(1):
"The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures."

(footnote continued on following page)

tention to the question now confronted.[5]

The uncertainty resulting from the silence of the Warsaw Convention on our problem is reflected by a split in the sparse decisional authorities.[6] The two federal district

---

(footnote continued from preceding page)

See also Article 25. A discussion of this argument may be found in M. Kamminger, *The Aircraft Commander in Commercial Air Transportation* 91 (1953); Pratt, *Carriage by Air Act—Limitation of Air Carrier's Liability—Whether Servants of Carrier Also Protected,* 41 Can.B.Rev. 124, 128 (1963).

5. Plaintiffs apparently agree, citing Ide, *The History and Accomplishments of the International Technical Committee of Aerial Legal Experts (C.I.T.E.J.A.),* 3 J. Air. L. & Comm. 27, 31, 37, 40 (1932), in making the statement that "the topic [of the status of crew members] was not treated at the Warsaw Conference."
Reference from the minutes to which the court's attention has been drawn seem at most to graze our problem. For example:
"Before examining the articles of the draft, it is necessary to bring out the fact that in this field, international agreement cannot be obtained unless it is limited to certain determined problems. Therefore the text only applies to the contract of carriage—first with respect to its external forms, and second in the legal relationships which are established between the carrier and the persons carried or the shipper. It does not govern any other questions which the exploitation of the carriage may bring out."
Report of Henry DeVos, submitting the CITEJA draft text to the Warsaw Conference, Minutes of the Warsaw Convention, p. 160, as contained in Calkins, *Grand Canyon, Warsaw and the Hague Protocol,* 23 J. Air. L. & Comm. 253, 267 n. 7 (1956). See also the comments of Sir Alfred Dennis (of Great Britain), Minutes of Warsaw Convention, p. 29:
"The exception of navigational errors of the command of the aircraft, at first glance, does not seem to be in accord with common law, because under common law, a carrier is generally responsible for the errors of his agent."
See also *id.* at 44; comments of Mr. Ambrosini of Italy, *id.* at 44.

6. For a discussion of the "conflicting opinions and decisions," see Pratt, *Carriage by Air Act, 1952—Limitation of Air Carrier's Liability—Whether Servants of Carrier Also Protected,* 41 Can.B.Rev. 124 (1963).

courts that have passed on closely analogous issues have reached opposite results. Compare *Pierre v. Eastern Air Lines, Inc.,* 152 F.Supp. 486, 489 (D.N.J.1957),[7] with *Chutter v. KLM Royal Dutch Airlines,* 132 F.Supp. 611, 613 (S.D.N.Y. 1955).[8]

2. With no unequivocal message from the language and history, we come to questions of policy. Here, again, there are pressures in both directions. The Warsaw Convention policy limiting liability, defendants' strongest support, had the well understood aim to protect infant air carriers from what were feared to be potentially fatal burdens of compensation to people injured or left bereaved while efforts to fly safely were proceeding.[9] It would be consistent with that policy to extend the protection to employees and agents, who might otherwise press for insurance or other forms of indemnity. And it is somewhat at odds with that policy to hold otherwise. It is not insignificant to note, however, that the original policy has lost a great deal of its persuasive force: air travel is no longer an infant industry.[10]

On the other side is a powerful national policy favoring compensatory damages from tortfeasors who cause per-

7. See also *Stratton v. Trans Canada Air Lines,* 27 D.L.R.2d 670 (British Columbia Supreme Ct. 1961), *aff'd on other grounds,* 32 D.L.R.2d 736 (British Columbia Ct.App. 1962).

8. See also *Wanderer v. Sabena and Pan American Airways, Inc.,* 1949 U.S. Aviation Reports 25 (Sup.Ct. N.Y. County 1949).

9. Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention,* 80 Harv.L.Rev. 497, 499 (1967); cf. Senate Comm. on Foreign Relations, *Message from the President of the United States Transmitting a Convention for the Unification of Certain Rules,* Sen. Exec. Doc. No. G., 73rd Cong., 2d Sess. 3-4 (1934).

10. We are reminded by *Day v. Trans World Airlines, Inc.,* 528 F.2d 31, 35 (2d Cir. 1975), that treaties, like constitutions, must be interpreted in light of modern day considerations: "For a court to view a treaty as frozen in the year of its creation is scarcely more justifiable than to regard the Constitutional clock as forever stopped in 1787."

sonal injury. A corollary principle of equal importance is the aversion of our law toward stipulations by common carriers "without congressional authority • • • against their own negligence or that of their agents or servants." *United States v. Atlantic Mutual Insurance Co.*, 343 U.S. 236, 242, 72 S.Ct. 666, 669, 96 L.Ed. 907, 914 (1952); *New York Central Ry. Co. v. Lockwood*, 84 U.S. (17 Wall.) 357, 21 L.Ed. 627 (1873). The absence of any express absolution in the Warsaw Convention embracing "agents or servants" must be deemed a cogent factor in the setting of American law. American adherence to the Warsaw Convention was not prompt, nor has it ever been particularly enthusiastic.[11] As all agree, the liability of the wrongdoing agent is a separate and clear source of redress, distinct from and logically prior to that of the principal. When the United States adhered to the Convention, it was not so exuberant a move as to warrant expansive constructions to amend firm national policies. This is, then, a fitting case in which to remember that a provision limiting liability for negligent injury is not readily to be inferred.[12] See, e. g., *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 580-81, 63 S.Ct. 425, 87 L.Ed. 471 (1943).

11. Past decades have seen an outpouring of criticism surrounding the Convention's limitations on liability. See, e.g., 111 Cong.Rec. 15032 (1965) (remarks of Senator Yarborough); *id.* at 16125-26 (remarks of Senator Ervin); *id.* at 20164 (remarks of Senator Robert Kennedy); see generally, Lowenfeld & Mendelsohn, *supra* note 9, cf. *Day, supra* at 36.

12. Nor is the inference a necessary one. The present importance of the Warsaw Convention lies primarily in its assurance of at least some level of compensation, without the difficult and time-consuming necessity of proving negligence or lack of due care, *Day, supra*, at 34, 36-37. Recoveries against persons other than the airline, in suits involving traditional standards of proof of negligence or breach of warranty, are not inconsistent with the standard of limited liability where far less is required for recovery.

On an issue not entirely dissimilar to the present one—on a claim perhaps less compelling, because dealing with property, not persons—the Supreme Court, in *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 79 S.Ct. 766, 3 L.Ed.2d 820 (1959), considered the reach of limitation of liability provisions in the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5).[13] Refusing to extend to a negligent stevedore the provision limiting an ocean carrier's liability to $500 per package of a shipper's cargo, the Court said, *id.* at 301-02, 79 S.Ct. at 769, 3 L.Ed.2d at 823:

> "There is • • • nothing in the language, the legislative history or environment of the Act that expressly or impliedly indicates any intention of Congress to regulate stevedores or other agents of a carrier, or to limit the amount of their liability for damages caused by their negligence. It must be assumed that Congress knew that generally agents are liable for all damages caused by their negligence. Yet Congress, while limiting the amount of liability of 'the carrier [and] the ship,' did not even refer to stevedores or agents of a carrier. 'We can only conclude that if Congress had intended to make such an inroad on the rights of claimants [against negligent agents] it would have said so in unambiguous terms' and 'in the absence of clear Congressional policy to that end, we cannot go so far.' *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 581, 584, 63 S.Ct. 425, 87 L.Ed. 471."

That interpretation of the Carriage of Goods by Sea Act is not conclusive, to be sure. But it is a highly persuasive

13. "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States • • • unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading."

analogy opposing the view of the defendants before us.

We are cited to authorities counseling strict construction of treaties, e. g., *Continental Dredging Co. v. County of Los Angeles,* 366 F.Supp. 1133, 1136 (C.D.Cal.1973); cf., *Isbrandtsen Co.* v. *Johnson,* 343 U.S. 779, 783, 72 S.Ct. 1011, 1014, 96 L.Ed. 1294, 1299 (1951); *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.,* 204 U.S. 426, 437, 27 S.Ct. 350, 354, 51 L.Ed. 553, 557 (1907), along with others suggesting liberality, e. g., *United States* v. *Pink,* 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *Valentime v. United States ex rel. Neidecker,* 299 U.S. 5, 57 S.Ct. 100, 81 L.Ed. 5 (1936); *Eck v. United Arab Airlines, Inc.,* 360 F.2d 804, 812 (2d Cir. 1966). See generally McNair, *The Law of Treaties* 364-92 (1961). Without resting too heavily upon canons, we know this is not a case for loose interpretations. The limitation for agents and employees would have been easy enough to specify. It was not stated. Those who acted for the United States in adhering to the Warsaw Convention had among their premises a strong animus against discovering liability limitations by implication. The totality of circumstances counsels against our inferring any such provision.

If the policy of protection of carriers were to be gutted by an interpretation against defendants, the demand for a less equivocal text might be untenable. But the fact is that a perfectly plausible compromise was possible that left the employees exposed. Indemnity was by no means automatic. Separate claims against employees, as the slight litigation history suggests, need not have been foreseen as major threats. Whatever speculative reasons may account for it, the drafters left out what defendants now seek, and the omission cannot be said to have been stultifying. Moreover, since the removal of the "due care defense,"[14] liability under the Warsaw Convention

14. The "due care" defense was removed when the Montreal Agreement was adopted in 1966. *Day, supra* at 36.

is certainly found under a different standard than liability outside it. See note 12, *supra.*

In short, if only the conflicting policies just noted were at stake, the court would incline to an interpretation favoring plaintiffs. But there is, as we proceed to note, at least a bit more to their position.

3. In 1955, most of the adherents and signatories to the Warsaw Convention adopted the amendments known for short as the Hague Protocol, officially "Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929."[15] Among the amended provisions is a new Article 25A, which expressly resolves the issue before this court by extending the Warsaw limits of liability to the carrier's servants and agents acting within the scope of their employment.[16] The United States has declined to adhere to the Hague Protocol.

Both the Hague document and the non-assent of the United States are subjects arguable pro and con. The new Article 25A, it may be said, merely affirmed the pre-

15. A concise history of the drafting of the Hague Protocol, and the subsequent failure of the United States to adopt it, is given in Lowenfeld & Mendelsohn, *supra* note 9, at 504-52.

16. Article 25A provides:
"(1) If an action is brought against a servant or agent of the carrier arising out of damage to which this Convention relates, such servant or agent, if he proves that he acted within the scope of his employment, shall be entitled to avail himself of the limits of liability which that carrier himself is entitled to invoke under Article 22.
"(2) The aggregate of the amounts recoverable from the carrier, his servants and agents, in that case, shall not exceed the said limits.
"(3) The provisions of paragraphs (1) and (2) of this article shall not apply if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result."

existing position.[17] Against that is the slightly stronger point that careful treaty drafters had omitted in Warsaw, then added at The Hague (using more than a few words for the purpose) what defendants claim was always there.[18]

17. See, e. g., Comments of Mr. Stalder of Switzerland, in 1 *International Conference on Private Air Law, The Hague, September 1955, Minutes* 216 (ICAO Doc. 7686—LC/140 1956) ("*Mr. Stalder* (Switzerland) stated that the Swiss Delegation saw no necessity for amending the Convention by an Article 25A. However, in order to assist the courts which would have to pass judgment on cases now carefully regulated by this article, he was prepared to accept it"); Comments of Mr. Ambrosini of Italy, *id.* at 220 ("He had always thought that the Warsaw Convention regulated not only the liability of the carrier, but, at the same time, that of his servants or agents"); cf. Beaumont, *The Proposed Protocol to Warsaw Convention of 1929*, 20 J. Air. L. & Comm. 264, 270 (1953) (the proposed draft of Article 25A "would set at rest serious doubts which have been expressed in connection with Article 25 concerning the position of servants and agents of the carrier"); Comments of the Netherlands, in 2 *International Conference on Private Air Law, The Hague, September 1955*, Documents, 171 (ICAO Doc. 7686—LC/140 1956); 1 *International Conference on Private Air Law, Guadalajara, August-September 1961, Minutes* 138 (ICAO Doc. 8301—LC/149—1 1962).

18. See, e. g., Comments of Mr. Alten of Norway, 1 *International Conference on Private Air Law, The Hague, September 1955, Minutes* 214 ("The preamble of the Warsaw Convention provided that the Convention had been adopted in order to secure a uniform regulation of the conditions of carriage in regard to the documents used for such carriage and the liability of the carrier. The Convention contained no provision concerning the liability of servants or agents. • • • The servants or agents of the carrier were not parties to the contract of carriage"); Comments and Proposals of the German Federal Republic, in 2 *International Conference on Private Air Law, The Hague, September 1955, Documents* 224; cf. Comments of Mr. Pedreira of Portugal, 1 *International Conference on Private Air Law, The Hague, September 1955, Minutes* 221 ("a principle limiting the liability of servants or agents was useful and just, for the servant or agent deserved the same protection as the carrier"); Comments of Mr. Booth of Canada, *id.* at 218 ("the absence of such a clause would permit a complete evasion of the provisions of the Convention in regard to the limits of liability of the carriers.")

As to this country's nonadherence, it may be argued that such post-Warsaw events are not authoritative concerning what the Convention as agreed to should be taken to mean. On the other hand, the Senate has a large hand in the business of treaty-making and a duty of knowledgeable response preceding that of the courts. The failure to adopt the Hague Protocol, considered always in the setting of apposite national policies, and in the swirl of dissatisfaction with any limitations in the Warsaw Convention, see note 11, *supra*, is a datum "relevant in ascertaining the proper construction • • • [of] the treaty's various provisions," *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35 (2d Cir. 1975).

4. Defendants raise several other issues in resisting this motion. First, they contend that the contract of carriage between TWA and the decedents,[19] as well as TWA's tariff provisions, filed with the Civil Aeronautics Board,[20] entitle them to the $75,000 limitation because both the contract and the tariff explicitly extend the carrier's limitation of liability to cover "agents, servants and representatives" of the carrier. Reference has been made in this

19. Paragraph 6 of the standard International Air Transport Association (I.A.T.A.) Airline ticket used by TWA, provides:
"Any exclusion or limitation of liability of carrier shall apply to and be for the benefit of agents, servants and representatives of carrier and any person whose aircraft is used by carrier for carriage and its agents, servants and representatives."

20. Passenger Rules Tariff No. R-3, Rule 16(c)(12) of TWA (C.A.B. No. 17), provides:
"Any exclusion or limitation of liability of Carrier under this tariff or the ticket shall apply to agents, servants, or representatives of the Carrier acting within the scope of their employment and also to any person whose aircraft is used by the Carrier and its agents, servants or representatives acting within the scope of their employment."

connection to 14 C.F.R. § 221.38(j) (1975), which provides, *inter alia,* that

> "each air carrier and foreign air carrier shall publish in its tariffs a provision stating whether it avails itself of the limitation on liability to passengers as provided in Article 22(1) of the Warsaw Convention or whether it has elected to agree to a higher limit of liability by a tariff provision. Unless the carrier elects to assume unlimited liability, its tariffs shall contain a statement as to the applicability and effect of the Warsaw Convention * * *."

[2] It has been established, however, by authoritative rule that the tariff provisions of an international carrier, whatever their effects in other countries, cannot impose limits of liability more stringent than those under the Warsaw Convention.[21] TWA, in its tariff, recognizes this

21. While the language does not convey the message with entire clarity, this prohibition results from 14 C.F.R. § 221.38(h), which states:

> "No provision of the Board's regulations issued under this part or elsewhere shall be construed to require on and after March 2, 1954, the filing of any tariff rules stating any limitation on, or condition relating to, the carrier's liability for personal injury or death. No subsequent regulation issued by the Board shall be construed to supersede or modify this rule of construction except to the extent that such regulation shall do so in express terms."

And the C.A.B., by Order Serial No. E-8756, 19 Fed.Reg. 7387, issued November 10, 1954, required all carriers and foreign air carriers to cancel from their tariffs, on or before January 1, 1955, all rules, regulations, or provisions stating any limitation on, or condition relating to, carrier liability for personal injury or death. The effect of these rules and regulations is to ban any further restrictions to the Warsaw Convention's limitation of liability. Pratt, *Tariff Limitations on Air Carriage Contracts,* 29 J.Air.L. & Comm. 14, 20 (1963). See also Warsaw Convention, Article 23. The cited regulation, 14 C.F.R. § 221.38(j), states no more than this.

(footnote continued on following page)

rule:

> "Rules stating any limitation on, or condition relating to, the liability of carriers for personal injury or death are not permitted to be included in tariffs filed pursuant to the laws of the United States, except to the extent provided in Rule 16(B)(1) with respect to Tariff C.A.B. No. 17, any [*sic*] such limitation or condition in any rule herein is not a part of Tariff C.A.B. No. 17, except to the extent provided in Rule 16(B)(1) with respect to Tariff C.A.B. No. 17, filed with the Civil Aeronautics Board of the United States. Nothing in this Tariff modifies or waives any provision of the [Warsaw] Convention."[22]

The quoted exception referring to Joint Tariff Rule 16 (B)(1) is no help to defendants; that Rule simply refers to Article 22(1) of the Warsaw Convention. To the extent any other limitations are included, TWA goes on to acknowledge, they are applicable only in tariffs filed in other countries.[23]

[3] It is evident, in sum, that the tariff provision defendants invoke gives them no more immunity than they

(footnote continued from preceding page)

Since the C.A.B. has so provided, we need not decide whether the C.A.B. would have the power, absent explicit Congressional directive, to extend the limitations of liability for personal injury or death. See, however, Warsaw Convention, Article 23 (no limit of liability beyond that found in the Warsaw Convention). Compare *Lichten* v. *Eastern Air Lines, Inc.,* 189 F.2d 939 (2d Cir. 1951), with *Brady* v. *Roosevelt S.S. Co.,* 317 U.S. 575, 63 S.Ct. 425, 87 L.Ed. 471 (1943).

22. Passenger Rules Tariff No. R-3, Rule 2 of TWA (C.A.B. No. 17); *id.* note to 16 (C)(2).

23. TWA has stated that insofar as its tariff provides for any limitation which goes beyond the Warsaw Convention, it is included only "as part of the tariff filed with governments other than the United States," where, it is remembered, the Hague Protocol may well be in effect. Passenger Rules Tariff No. R-3, Rule 2 of TWA (C.A.B. No. 17); *id.,* note to 16(C)(2).

may have under the Warsaw Convention.

[4] Defendants' arguments from the tickets decedents bought are more clearly unavailing: the ticket clearly cannot create limitations forbidden by the tariff.[24]

5. Finally, defendants argue that as corporate officers of TWA acting within the scope of their employment, they could be liable, if at all, only for misfeasance or malfeasance, not nonfeasance. The parties discuss this contention variously in terms of New Jersey and New York law without touching explicitly on the possible conflicts of law issue.

Plaintiffs, all residents of states "other than New Jersey," filed this action in New Jersey, where defendants are residents. The case was thereafter transferred to this court. The complaint alleges jurisdiction pursuant to 28 U.S.C. §§ 1332 and 1333, 46 U.S.C. § 761 *et seq.* ("Death on High Seas Act"), and general maritime law. It is not at all clear at this stage what law will be deemed applicable in determining the liability *vel non* of defendants as officers of TWA. Nor is it possible at this stage to know what the consequences of applying any particular body of law will come to be.

While New York, with varying degrees of rigor, still applies in certain situations the misfeasance-nonfeasance

24. Joint Tariff, Article 18; see also 49 U.S.C. § 1373 (1970); *Tishman & Lipp* v. *Delta Air Lines,* 413 F.2d 1401 (2d Cir. 1969); *Lichten* v. *Eastern Air Lines, Inc.,* 189 F.2d 939, 941 (2d Cir. 1951); *Randall* v. *Frontier Airlines, Inc.,* 397 F.Supp. 840 (W.D.Ark.1975); *Berkman* v. *TWA, Inc.,* 209 F.Supp. 851, 853 (S.D.N.Y. 1962); *Wittenberg* v. *Eastern Air Lines, Inc.,* 126 F.Supp. 459 (E.D.S.C.1954); *Eastern Air Lines, Inc.* v. *Williamson,* 282 Ala. 421, 211 So.2d 912 (1968); *New York & Honduras Rosario Mining Co.* v. *Riddle Airlines, Inc.,* 3 A.D.2d 457, 162 N.Y.S.2d 314 (1st Dept., 1957), aff'd, 4 N.Y.2d 755, 172 N.Y.S.2d 168, 149 N.E.2d 93 (1958); Note, *Air-Carrier Tariff Provisions Limiting Liability for Negligence,* 70 Harv.L.Rev. 1282, 1282 (1957); Markham & Blair, *The Effect of Tariff Provisions Filed Under the Civil Aeronautics Act,* 15 J. Air. L. & Comm. 251 (1948).

distinction for corporate agents, *Jones v. Archibald,* 45 A.D.2d 532, 360 N.Y.S.2d 119 (4th Dept. 1974); *Michaels v. Lispenard Holding Corp.,* 11 A.D.2d 12, 201 N.Y.S.2d 611 (1st Dept. 1960), the distinction has disappeared in other states, see, e. g., *Miller v. Muscarelle,* 67 N.J.Super. 305, 170 A.2d 437, 445-51 (A.D.), certification denied, 36 N.J. 140, 174 A.2d 925 (1961). Although TWA is headquartered in New York, it is impossible to say at this moment that New York law necessarily should control, especially when considering the interests of decedents and the policies of their respective states.

[5] It is also to be noted that the nonfeasance-misfeasance distinction, itself never very clear,[25] has exceptions, even where it is found to apply, depending, *inter alia,* on the power and responsibility of the corporate officers.[26] This issue, as well as the basic factual question whether the asserted negligence constituted nonfeasance or misfeasance, depends on evidence yet to be adduced.

In conclusion, the motion to strike defendants' second affirmative defense will be granted, as the Warsaw Convention does not limit the liability of employees or agents of a carrier, and TWA's tariff does not purport to otherwise limit its, or its employees', liability.

So ordered.

25. See generally W. Prosser, *Torts* 339-40 (4th ed. 1971).

26. See, e. g., 3A *Fletcher Cyclopedia Corporations* § 1135 at 203(1975):

> "The rules governing liability of agents in general, to third persons, for their torts, as laid down in textbooks on the law of agency, are almost invariably applicable to the liability of corporate officers to third persons for their torts • • • The rule of nonliability for the negligence of an agent or servant on account of nonfeasance is limited to breaches of duty owed by him to his principal, and has no application where there is a breach of duty owing by the agent himself to third persons."

See also Restatement, Second, Agency § 354; *id.,* Reporter's Notes to Sections 305-357 at 581 (Appendix).

APPENDIX G

WARSAW CONVENTION MINUTES
Official French Transcript

II Conférence Internationale
de
Droit Privé Aérien

4 — 12 Octobre 1929

Varsovie

WARSZAWA
1930

Nr. 2 (1930)

Appendix G.

Lands
34-42628

Imprimé et publié

par les soins

du Ministère des Affaires Étrangères

de Pologne

Drukarnia Wł. Łazarskiego Warszawa, Złota 7 9

PROCÈS-VERBAUX

M. LE PRÉSIDENT. — Personne ne demande plus la parole?... Je mets l'article 22 aux voix.

(Adopté).

Nous passons à l'article suivant:

Article 23.

Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente Convention est nulle et de nul effet, mais la nullité de cette clause n'entraine pas la nullité du contrat qui reste soumis aux dispositions de la présente Convention.

M. GIANNINI — Président de la commission — Au sujet de cet article j'attire votre attention sur le fait que l'article précédent dans l'avant-projet portait un alinéa ainsi conçu:

„Rien n'empêche le transporteur de formuler des règles qui ne soient pas en contradiction avec les dispositions de la présente Convention".

Le comité de rédaction a été d'accord pour insérer cet alinéa dans une des dispositions finales de la Convention. Vous le retrouvez donc dans un autre article.

M. LE PRÉSIDENT. — Personne ne demande plus la parole?... Je mets l'article 23 aux voix.

(Adopté).

Nous passons à l'article suivant:

Article 24.

1) Dans les cas prévus à l'article 17, même en cas de décès toute action en responsabilité à quelque titre que ce soit ne peut être exercée que dans les conditions et limites prévues par la présente Convention, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs.

2) Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient d'un dol du transporteur ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalent au dol.

3) Il ne le pourra pas dans les mêmes conditions, s'il s'agit d'un acte de ses préposés commis dans l'exercice de ses fonctions.

M. GIANNINI — Président de la commission — J'appelle l'attention de la conférence sur le deuxième alinéa. Nous avons réussi à trouver cette formule qui a contenté aussi nos amis de la Grande Bretagne, par laquelle nous avons réussi à adapter l'expression de „faute lourde et de dol", expression qui est difficile à traduire en anglais.

Je crois que le désir de la conférence trouve satisfaction dans cette formule, quant au fond; mais si quelque Délégué peut suggérer une formule plus heureuse, nous en serons les premiers très contents.

M. VIVENT — (France) — Je voudrais signaler un petit détail de rédaction. A l'alinéa 3, qui me semble devoir être revu, je lis:

„Il ne le pourra pas dans les mêmes conditions s'il s'agit d'un acte de ses préposés dans l'exercice de ses fonctions".

Il faudrait mettre „dans l'exercice de leurs fonctions" ou alors dire:
„s'il s'agit de l'acte d'un de ses préposés commis dans l'exercice de ses fonctions".

M. SABANINE — (URSS) — Je me demande s'il est bien français de dire:
„Il ne le pourra pas dans les mêmes conditions".

M. YOUPIS — (Grèce) — Il vaudrait mieux dire: „Il n'aura pas ce droit dans les mêmes conditions".

M. WOLTERBEEK-MULLER — (Pays-Bas) — Je propose de scinder cet article et de faire avec les alinéas 2 et 3 un article spécial. Dans le premier alinéa il s'agit de mort et de blessures, alors que dans les autres alinéas il s'agit de marchandises. Pour qu'il n'y ait pas de confusion, je crois qu'il vaudrait mieux faire deux articles.

M. GIANNINI — Président de la commission — Permettez-moi de vous faire remarquer que le début de l'article dit: „Dans les cas prévus à l'article 17".

M. WOLTERBEEK-MULLER — (Pays-Bas) — Oui, l'article 17 parle de mort et de blessures. Dans l'article référé il n'est question que de personnes; ici dans les deux derniers alinéas il est question de marchandises et de bagages.

M. GIANNINI — Président de la commission — Oui, la chose s'est produite parce que nous avons réparti la question en plusieurs articles. Je crois, en effet, qu'il faudrait diviser l'article.

M. WOLTERBEEK-MULLER — (Pays-Bas) — Je m'en remets pour cela au comité de rédaction.

M. LE PRÉSIDENT — Le comité de rédaction sera chargé de trouver les formules de la modification proposée.

M. PITTARD — (Suisse) — Je m'excuse personnellement; je faisais partie du comité de rédaction. C'est en voyant les articles dans leur ensemble qu'on remarque les incohérences qui ont échappé.

Ici, la phrase qui commence l'alinéa 3 pourrait faire croire que le transporteur est placé dans des conditions différentes. On pourrait dire:

„Il en sera de même s'il s'agit de l'acte de l'un de ses préposés etc..."

M. SUDRE — Secrétaire Général — Je voudrais indiquer au comité de rédaction que la formule de l'ancien alinéa 2 serait donc, d'après ce qui a été dit:

„Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol".

Il y avait dans le texte une faute sur le mot „équivalente".

SIR ALFRED DENNIS — (Grande Bretagne) — Nous avons au début de l'article: .....toute action en responsabilité à quelque titre que ce soit ne peut être exercée que dans les conditions et limites prévues par la présente Convention".

C'est une stipulation très importante qui touche au fond même de la Convention, parce que cela exclut le recours au droit commun; à l'origine, c'était un article séparé. Aussi on mélange ce qui ne doit servir que pour les personnes avec les marchandises et les bagages. Il me semble qu'il faudrait faire une nouvelle rédaction en deux articles.

M. GIANNINI — Président de la commission — C'est ce qui a été entendu.

SIR ALFRED DENNIS — (Grande Bretagne) — Il y a les mots: si le dommage provient de son dol. C'est une question technique; il s'agit des termes employés par la loi. Je voudrais qu'il soit noté au procès-verbal qu'il résulte des explications qui ont été échangées que nous avons pour traduire ces mots en anglais l'expression de *wilful misconduct*, qui est très connue, et qui est très bien définie dans notre loi.

M. PITTARD — (Suisse) — En ce qui concerne le 3-me alinéa, il faudrait changer la phrase de début qui ne va pas. On pourrait dire: „De même il n'aura pas ce droit" ou encore. „Il en sera de même si le dommage provient etc..."

Je n'ai pas de préférence pour l'une ou l'autre de ces formules.

M. VIVENT — (France) — Je voulais proposer une rédaction, mais je me rallie à celle de M. Pittard.

M. SUDRE — Secrétaire Général — Alors, l'article 24 actuel serait scindé, les deux derniers alinéas devenant l'article 25; le troisième alinéa actuel, qui deviendrait le deuxième alinéa de l'article 25 serait ainsi libellé:

„Il en sera de même s'il s'agit de l'acte de l'un de ses préposés, commis dans l'exercice de ses fonctions".

M. ROPER — (CINA). — Il y a une phrase qui n'est pas française. On ne peut pas dire „mon dol", „ton dol", „votre dol"! Cela n'existe pas!

M. VIVENT — (France). — Je vous demande pardon!

M. RICHTER — (Allemagne). — J'ai des doutes sur le point de savoir, si la formule

de M. Pittard correspond exactement à ce que nous voulons dire. Je crois que l'on pourrait dire: „Il n'aura pas ce droit s'il s'agit etc...".

Je demande si mon observation est juste?

M. VIVENT — (France). — Je propose la formule suivante:

„Ce droit lui sera également refusé si l'acte est commis dans les mêmes conditions par l'un de ses préposés dans l'exercice de ses fonctions". (Approbation générale).

M. LE PRÉSIDENT — Par conséquent, il est entendu que l'article 24 sera divisé Le premier alinéa sera remanié.

Les deux alinéas suivants formeront l'article 25, avec, pour le troisième, la rédaction proposée par M. Vivent.

Je mets les deux articles aux voix.

(Adopté).

Nous passons à l'article suivant:

Article 26

1) La réception des bagages et marchandises sans protestation par le destinataire constituera présomption, sauf preuve contraire, que les marchandises ont été livrées en bon état et conformément au titre de transport.

2) Cette protestation doit intervenir en ce qui concerne les bagages dans un délai de trois jours, pour les marchandises dans un délai de sept jours et pour le cas de retard de bagages ou de marchandises dans un délai de quatorze jours.

3) Toute protestation doit être faite par réserve inscrite sur le titre de transport ou par un autre écrit expédié dans le délai prévu pour cette protestation.

M. GIANNINI — Président de la commission — Je dois appeler l'attention de la conférence sur les points suivants:

Il y a eu quelques divergences sur la décision prise par la conférence. Si vous lisez l'ancien article 30, vous voyez que l'enlèvement des marchandises sans protestation par les destinataires constitue une présomption, sauf preuve contraire que les marchandises ont été délivrées en bon état et conformément au titre de transport. C'est la règle que nous avons reprise dans l'article 27.

Ensuite, on faisait une disposition à part pour les cas d'avaries non apparentes et on disait:

„Toutefois, au cas d'avaries non apparentes ou de retard, le destinataire aura un délai de sept jours de la réception de la marchandise".

Or, sur ces différents points, nous ne sommes pas d'accord pour bien interpréter les désirs de la conférence.

Est-ce que la conférence désire faire une règle particulière pour les avaries non apparentes, ou conserver une règle générale?

Si vous souhaitez avoir une règle générale, la formule de l'alinéa 2 vous donne satisfaction. Mais si vous désirez faire une discrimination entre l'avarie apparente et l'avarie non apparente, il faut modifier cet alinéa 2.

J'ai le devoir de poser la question à la conférence.

M. MOTONO — (Japon) — Je voudrais préciser que, passé ces délais de 3 jours, 7 jours et 14 jours, que l'avarie soit apparente ou non apparente, l'intéressé n'a plus de recours. C'était l'idée du comité de rédaction.

M. ROPER — (CINA) — J'ai pris quelques notes pendant la discussion et je pourrais peut-être vous fournir quelques indications.

Une proposition de M. Richter avait été retenue après discussion. Elle disait:

„Toutefois, en cas d'avarie non apparente le destinataire devra protester immédiatement après la découverte du dommage et au plus tard dans un délai de ..... jours".

Ensuite, M. Chadin, à propos du retard, avait demandé que, comme règle générale, on admette que le transporteur ne soit en aucun cas traité plus mal que le transporteur par voie terrestre et qu'on applique, au maximum, les délais de la Convention de Berne.

BEST COPY AVAILABLE

APPENDIX H

WARSAW CONVENTION MINUTES

English Translation

SECOND

INTERNATIONAL CONFERENCE

on

PRIVATE AERONAUTICAL LAW

October 4–12, 1929
Warsaw

MINUTES

TRANSLATED BY

Robert C. Horner
Dartmouth College A. B.
Faculte des Lettres, Strasbourg France
New York University School of Law J. D.
Member, New York Bar

Didier Legrez
Licencie es Lettres
Diplome d'etudes superieures de droit prive
Avocat a la Cour d'Appel de Paris

Fred B. Rothman & Co.
South Hackensack, New Jersey
1975

Appendix H.

THE PRESIDENT: No one asks the floor?...I put Article 22 to a vote.

(Adopted).

We pass to the following article, Article 23.

Article 23

Any provision tending to exonerate the carrier from his liability or to establish a lower limit than that which is fixed in the present Convention shall be null and void, but the nullity of this clause shall not lead to the nullity of the contract, which shall remain subject to the provisions of the present Convention.

MR. GIANNINI, President of the Committee: On the subject of this article, I draw your attention to the fact that the preceeding article in the draft bore a paragraph conceived thus:

Nothing shall prevent the carrier from formulating rules which are not in contradiction to the provisions of the present Convention.

The drafting committee was in agreement to insert this paragraph in one of the final provisions of the Convention. You will find it, therefore, in another article.

THE PRESIDENT: No one asks the floor?...I put Article 23 to a vote.

(Adopted).

We pass to the following article.

Article 24

1) In the cases provided for in Article 17, even in the case of death, any liability action however founded can only be brought under the conditions and limits provided for by the present Convention, without prejudicing the determination of those persons who have the right to act, and without prejudicing their respective rights.

2) The carrier shall not have the right to avail himself of the provisions of the present Convention which exclude or limit his liability, if the damage arises out of the willful misconduct of the carrier or from a fault which, according to the law of the tribunal which has taken

jurisdiction, is considered as the equivalent of willful misconduct.

3) The carrier shall not be able to so avail himself under the same conditions, if an act of his servants, committed in the exercise of his functions, is involved.

MR. GIANNINI, President of the Committee: I call the attention of the conference to the second paragraph. We succeeded in finding this formula, which has also satisfied our friends from Great Britain, by which we have succeeded in adapting the expression, "faute lourde et de dol", an expression which is difficult to translate into English.

I believe that the desire of the conference can be satisfied with this formula, as regards substance; but if some delegate can suggest a happier formula, we'd be the first to be satisfied.

MR. VIVENT (France): I'd like to point out a small detail of wording. At paragraph 3, which, it seems to me, must be revised, I read:

> The carrier shall not be able to so avail himself under the same conditions, if an act of his servants, committed in the exercise of his functions, is involved.

One should put "in the exercise of their functions" or then say: "If the act of one of his servants committed in the exercise of his functions, is involved".

MR. SABANIN (USSR): I wonder if it's good French to say: "He shall not be able to so avail himself under the same conditions".

MR.YOUPIS (Greece): It would be better to say: "He shall not have this right under the same conditions".

MR. WOLTERBEEK-MULLER (Netherlands): I propose to divide up this article and to make a special article with paragraphs 2 and 3. In the first paragraph, death and wounding are involved, while in the other paragraphs goods are involved. So that there be no confusion, I think it would be better to make two articles.

MR. GIANNINI, President of the Committee: Permit me to remark to you that the beginning of the article says: "in the cases provided for at Article 17".

MR. WOLTERBEEK-MULLER (Netherlands): Yes, Article 17 speaks of death and wounding. In the article referred to it's a question only of persons; here in the last two paragraphs it's a question of goods and baggage.

MR. GIANNINI, President of the Committee: Yes, the thing

arose because we have divided up the question in several articles. I believe, in effect, that one should divide the article.

MR. WOLTERBEEK-MULLER (Netherlands): I leave it to the drafting committee.

THE PRESIDENT: The drafting committee will be charged with finding the formulae for the modification proposed.

MR. PITTARD (Switzerland): I apologize for myself; I took part in the drafting committee. It's only upon seeing the articles in their ensemble that one notes the incoherences which have escaped us.

Here, the sentence which begins paragraph 3 could make one believe that the carrier is placed under different conditions. One could say: "It shall be the same if the act of one of his servants is involved, etc...".

MR. SUDRE, Secretary General: I'd like to indicate to the drafting committee that the formula of the former paragraph 2 would be, therefore, according to that which has been said:

> The carrier shall not have the right to avail himself of the provisions of the present Convention which exclude or limit his liability, if the damage arises from a willful misconduct or from a fault which, according to the law of the court having taken jurisdiction, is considered as the equivalent of willful misconduct.

There was an error in the text on the word "equivalent".

SIR ALFRED DENNIS (Great Britain): We have at the beginning of the article: "...any liability action however founded can only be brought under the conditions and limits provided for by the present Convention".

It's a very important stipulation which touches the very substance of the Convention, because this excludes recourse to common law; originally, it was a separate article. Also, one mixes together that which must serve only for persons with that for goods and baggage. It seems to me that it would be better to make a new wording in two articles.

MR. GIANNINI, President of the Committee: That's what was agreed.

SIR ALFRED DENNIS (Great Britain): There are the words: "if the damage arises from his willful misconduct". It's a technical question; it's a question of terms used by law. I would like it to be noted in the minutes that it results from the explanations which were exchanged that we have the expression "willful misconduct" to translate these words into English, which is very well known and which is very well defined in our law.

Appendix H.

MR. PITTARD (Switzerland): As regards the third paragraph, one ought to change the first sentence, which doesn't work. One could say: "likewise he shall not have this right" or even: "It shall be the same if the damage arises, etc...".

I have no preference for one or the other of these formulae.

MR. VIVENT (France): I wanted to propose a wording, but I ally myself with that of Mr. Pittard.

MR. SUDRE, Secretary General: Then, the present Article 24 will be divided up, the two last paragraphs becoming Article 25; the present third paragraph, which would become the second paragraph of Article 25, would be worded thus:

> It shall be the same if the act of one of his servants, committed in the exercise of his functions, is involved.

MR. ROPER (CINA): There is a sentence which is not good French. One cannot say "mon dol", "ton dol", "votre dol"! That doesn't exist!

MR. VIVENT (France): I beg your pardon!

MR. RICHTER (Germany): I have some doubts in knowing if Mr. Pittard's formula corresponds exactly to what we want to say. I believe that one could say: "He shall not have this right if, etc...".

I ask if my observation is accurate.

MR. VIVENT (France): I propose the following formula:

> This right will be likewise refused to him if the act is committed under the same conditions by one of his servants in the exercise of his functions.

(General approval).

THE PRESIDENT: Consequently, it is understood that Article 24 will be divided. The first paragraph will be reshaped.

The two following paragraphs will make up Article 25 with, for the third, the wording proposed by Mr. Vivent.

I put the two articles to a vote.

(Adopted).

We pass to the following article.

Article 26

> 1) Receipt of baggage and goods without protest by the consignee shall constitute <u>prima facie</u> evidence

Supreme Court, U. S.
FILED
OCT 1 1977
SODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-339

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants et al.,

Petitioners,

v.

FORWOOD CLOUD WISER, JR., and RICHARD E. NEUMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JOHN J. MARTIN and
EDWARD M. O'BRIEN
14 Wall Street
New York, New York 10005
Attorneys for Respondents

Of Counsel

BIGHAM ENGLAR JONES & HOUSTON
14 Wall Street
New York, New York 10005

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Treaty Involved	2
Question Presented	2
Statement of Case	2
Argument	4
I. The Decision Below Is Clearly Correct	5
II. There Is No Conflict Of Decision	10
III. There Is No Important Question Of Federal Law	12
Conclusion	14

Table of Authorities

Cases:

Block v. *Compagnie Nationale Air France*, 386 F.2d 323, 337-38 (5th Cir. 1967) 6, 7, 13

Communist Party v. *Subversive Activities Control Board*, 376 U.S. 1, 71 (1961) 11

Day v. *Trans World Airlines, Inc.*, 528 F.2d 31, 36-38 (2d Cir. 1975) 6, 8, 13

Eck v. *United Arab Airlines, Inc.*, 15 N.Y.2d 53, 59 (1964) 255 N.Y.S.2d 249, 252 6

PAGE

Evangelinos v. *Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) 6

Geofroy v. *Riggs*, 133 U.S. 258, 270 (1889) 8

In re Pago Pago Air Crash of January 30, 1974, 419 F.Supp. 1158 (C.D.Cal. 1976) 11

In re Paris Air Crash of March 3, 1974, 399 F.Supp. 732 (C.D.Cal. 1975) 8

Jones v. *Archibald*, 45 A.D.2d 532 (4th Dept. 1974) .. 11

Lutz Feed Co., Inc. v. *Audet & Company, Inc., et al.*, 72 Misc.2d 28 (1972) 11

Maximov v. *United States*, 299 F.2d 565, 568 (2d Cir. 1962) aff'd 373 U.S. 49 (1963) 8

Michaels v. *Lipenana Holding Corp.*, 11 A.D.2d 12 (1st Dept. 1960) 9, 11

Pierre v. *Eastern Airlines, Inc.*, 152 F.Supp. 486 (D.N.J. 1957) 10

Rosman v. *Trans World Airlines, Inc.*, 34 N.Y.2d 385 (1974), 358 N.Y.S.2d 97 6

Treaties:

Warsaw Convention, 49 Stat. 3000, et seq. 2, 6

Montreal Agreement CAB 18990, Order E-23680 ... 3

Statutes:

Death on the High Seas Act, 46 U.S.C. Sec. 761, et seq. 3, 9

28 U.S.C. Secs. 1332, 1333 3

Other Authorities:

PAGE

Aeronautical Statutes and Related Materials, pp. 512-514 (C.A.B. 1974) 10

Agreement CAB 25632, Docket No. 28713, Order 77-7-85, dated July 20, 1977 13

Aviation Law Reporter (CCH) Vol. 3 (looseleaf), ¶ 27,054, pp. 24,059-2, 24,059-3 4

H. Drion, *Limitations of Liabilities in International Air Law*, 158 (1954) 6

Martin, *Death and Injury in International Air Transport*, 41 J.Air. L. & Com. 255, 256 4

2A *Warren's Negligence*, Sec. 3.03, pp. 50-55 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 339

RUTH ANN REED, as Administratrix of the Estate of DAN WILLIAM REED, deceased, and as parent, natural guardian, and best friend of CYNTHIA ANN REED, DEBORA LYNN REED and JULIE MARIE REED, all infants et al.,

Petitioners,

v.

FORWOOD CLOUD WISER, JR., and RICHARD E. NEUMAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Opinions Below

The Opinion of the Court of Appeals is reported at 555 F.2d 1079 and also appears in petitioners' separate Appendix to the petition (A28a). The Opinion of the District Court is reported at 414 F.Supp. 863 and also appears in petitioners' Appendix (A61a).

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Treaty Involved

The Treaty involved in this litigation is officially entitled "Convention For The Unification Of Certain Rules Relating To International Transportation by Air". It is commonly known as the Warsaw Convention. The official French text is reported at 49 Stat. 3000 and the unofficial English translation is reported at 49 Stat. 3014, T.S. No. 876. Adherence of the United States was proclaimed on October 29, 1934, 49 Stat. 3013. Articles 17, 20, 22, 24 and 25 of the French text and English translation are set forth in the petition at pages 3-6.

Question Presented

When employees of an air carrier are sued individually in actions governed by the Warsaw Convention are they entitled to the protection of the Treaty's limitations of liability or is that protection only for the benefit of their employers?

Statement of the Case

This action arises out of the crash of a Trans World Airlines, Inc. (T.W.A.) 707 jet aircraft into the high seas approximately 50 nautical miles west of Cephalonia, Greece, on September 8, 1974 (R.7 ¶ 3).* All aboard died in the crash. Petitioners-plaintiffs allege that a bomb or other explosive device was permitted to be placed or carried aboard the aircraft and that it exploded shortly after tak-

* References preceded by "R" refer to pages in the record contained in the Joint Appendix, filed in the Court of Appeals.

ing off from Athens, Greece, causing the loss of control of the aircraft and its crash into the Ionian Sea (R.7 ¶ 6).

Petitioners, the personal representatives of the estates of 9 of the passengers, sue in negligence to recover wrongful death damages from defendants-respondents, the then President of T.W.A. and the Staff Vice-President of Audit and Security of T.W.A. (R.7 ¶¶ 4, 5). T.W.A. is not named as a defendant in this action, although it is sued by these petitioners in a separate action pending in the Southern District of New York (75 Civil 3136). Jurisdiction in the District Court is based upon 46 U.S.C. Sec. 761 et seq., The Death on the High Seas Act. Jurisdiction is also alleged under 28 U.S.C. Secs. 1332, 1333 and the general maritime law (R.7).

In their Second Affirmative Defense the defendants pleaded the decedents' transportation was governed by the provisions of the Warsaw Convention, as amended by the Montreal Agreement,* and that defendants' liability, if any, was limited to a maximum of $75,000.00 for the death of each passenger (R.26-28). Plaintiffs' motion to strike this defense as legally insufficient was granted by the District Court (R.286; A.6b). On defendants' motion, the District Court certified the question for an interlocutory appeal to the Court of Appeals (R.302). The Court of Appeals thereafter granted defendants leave to appeal (R.303). Jurisdiction of the Court of Appeals is based on the Interlocutory Appeals Act, 28 U.S.C. Sec. 1292(b). The Court of Appeals reversed the Order of the District Court "with instructions to reinstate defendants' defense based on that Convention", 555 F.2d at 1079; A.57a-59a. Petitioners' motion for rehearing or rehearing *en banc* was denied (A.60a).

* Agreement Relating To Liability Limitations Of The Warsaw Convention And The Hague Protocol, Agreement CAB 18990, approved by order E-23680, May 13, 1966 (Docket 17325). This Agreement has the general effect of increasing the Treaty's limits to $75,000, and imposing absolute liability on the carrier.

ARGUMENT

Petitioners make no claim that the Warsaw Convention Treaty is unconstitutional. A mere reading of their petition demonstrates that all they are claiming is that the Court of Appeals' decision is erroneous. Their petition offers nothing more than the same arguments, in abbreviated form, which the Court of Appeals so emphatically rejected. They cite no new or different cases to support their arguments; the ten cases cited in the petition were also cited to and considered by the Court of Appeals.

The Warsaw Convention has been the supreme law of the land since this country adhered to that treaty in 1934. Yet during the 43 years that have elapsed since that time and the decision below, only one court was ever called upon to decide whether the treaty's limitation of liability applied to the airline's *employee* as well as his employer. Surely, this lends strong support for the conclusion that the courts, the bar and the public had always accepted what the Court of Appeals determined—that the limitation applied to both. This conclusion is fortified by the fact that the Warsaw Convention is undoubtedly the subject of more litigation in the United States than any other treaty. See, Martin, *Death and Injury in International Air Transport*, 41 J. Air L. & Com. 255, 256 (1975).

The petitioners' arguments, if accepted, would render this treaty* meaningless. Their contention, that the limitation of liability in Article 22(1) applies only to the "carrier", simply because "servants" or "employees" are not specifically mentioned (Petition, Point II, p. 8), is based upon nothing more than a strict literal reading of the

* As of July, 1976, there were approximately 114 member nations which were parties to the Warsaw Convention. Aviation Law Reporter (CCH) Vol. 3 (looseleaf), ¶ 27,054, pp. 24,059-2, 24,059-3.

treaty without any thought given to the purposes and objectives of the treaty or to what the Convention's delegates sought to accomplish. Judge Mansfield, in his opinion in the Court of Appeals (A.28a, A.55a), said of this approach:

> "It is difficult to imagine an interpretation more at odds with the acknowledged purposes of the Convention than that for which [petitioners] press." 555 F.2d at 1092.

On the single and narrow issue involved in this case the decision of the Court of Appeals was clearly correct. There is no asserted conflict of decision with any other Circuit. In light of the treaty's fundamental purpose to regulate the liability of the air carrier in a uniform manner, no other result could have been reached.

I.

The Decision Below Is Clearly Correct

After a thorough and searching examination of the entire Warsaw Convention, including its relevant provisions, legislative and subsequent history, and overall purposes, the Court of Appeals concluded that unless the liability limits of the treaty applied to the carrier's employees the objectives of the treaty's pertinent provisions would be frustrated. The Court of Appeals noted that if the treaty's uniform liability limitations could be circumvented by the simple device of suing the carrier's employees, as was done in this case, the entire character of international air disaster litigation involving aircraft of American air carriers would be radically changed because the air carriers then would be forced to provide indemnity to such employees, if they had not already done so, for recoveries higher than the uniform limits specified in the treaty (A.32a). The consequence of such suits was pointed out

by Judge Mansfield (A.48a):

> "To permit a suit for an unlimited amount of damages against a carrier's employees for personal injuries to a passenger would unquestionably undermine this purpose behind Article 22, since it would permit plaintiffs to recover from the carrier through its employees damages in excess of the Convention's limits. This impact was recognized by Professor Drion prior to the Hague Conference when he urged that the interpretation presently sought by [respondents] be given to the Warsaw provisions:
>
> > 'Any other solution would defeat the purpose of Article 24, which is to prevent claimants from avoiding the provisions of the Convention by suing the enterprise outside the contract of carriage.'
>
> H. Drion, Limitations of Liabilities in International Air Law 158 (1954)." 555 F.2d at 1089.

Judge Mansfield then noted that "Virtually all delegates . . . agreed that unless the limits applied the Convention's pertinent provisions would be frustrated." (*id.*).

It cannot be disputed that the Warsaw Convention's most fundamental objective is to provide a uniform system of liability and litigation rules for international air disasters. Not only was the Court of Appeals of this view (A.55a) but the treaty itself, in its Preamble, clearly articulates this desired uniformity of liability, 49 Stat. 3000, 3014. See, also, *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323, 337-38 (5th Cir. 1967); *Eck* v. *United Arab Airlines, Inc.,* 15 N.Y.2d 53, 59 (1964), 255 N.Y.S.2d 249, 252; *Rosman* v. *Trans World Airlines, Inc.,* 34 N.Y.2d 385, 396 (1974), 358 N.Y.S.2d 97, 106; *Day* v. *Trans World Airlines, Inc.,* 528 F.2d 31, 36-38 (2d Cir. 1975); *Evangelinos* v. *Trans World Airlines, Inc.,* 550 F.2d 152 (3d Cir. 1977). It is clear, therefore, that the Court of Appeals' decision accomplishes the desired uniformity intended by the Convention delegates. In the *Block* case, *supra,* the Court of Appeals for the Fifth Circuit rejected an argument by plaintiffs almost identical to that made by petitioners. In *Block* the plaintiffs contended that charter flights, as distinguished from regular scheduled commercial flights, were not covered by the Warsaw Convention because nowhere in the treaty was the term "charter" referred to. In rejecting this argument Judge Wisdom said:

> "It ignores the position of a number of Citeja members and others who assumed the applicability of the Warsaw Convention to the contract of carriage resulting from voyage charter. . . . It underestimates both the vision of the men who drafted the convention and the tenacity with which they held to their objective of creating uniformity in the area of the carrier's responsibility to its passengers and shippers." 386 F.2d at 338.

One of such men was Professor Ambrosini of Italy, a delegate and author of the draft convention submitted to the conference at Warsaw. The Court below quoted Ambrosini's views (A. 35a, A. 36a) that:

> "'He had always thought that the Warsaw Convention regulated not only the liability of the carrier, but, at the same time, that of his servants or agents, and *especially for the simple reason that, in his opinion, the carrier and his servants or agents were, from the legal point of view, the same person.*'"
>
> • • •
>
> "Later Professor Ambrosini expanded on this interpretation:
>
> > 'As to the more general question whether the Warsaw Convention provided for the limitation of liability of the servants or agents, his opinion was that, under the general legislative and legal system, servants and agents, as the *longa manus* of their

employer, would enjoy the same situation as the latter. From the legal point of view, there could not be a system whereby the carrier would be liable with limits and the servants and agents without limits.'" 555 F.2d at 1084. (Emphasis by Court.)

Throughout this litigation petitioners have pressed for a literal interpretation of this treaty. Such an approach has not only been rejected by this Court, but also by a number of appellate court decisions interpreting the Warsaw Convention (see, A.45a-A.47a). The literal and restricted views contended for by petitioners assume an intent on the part of the Warsaw delegates that they wished to plant the seed of the treaty's own destruction. Such an intent cannot be allowed. *Geofroy* v. *Riggs,* 133 U.S. 258, 270 (1889). The specific words of this treaty should be given "a meaning consistent with the genuine shared expectations of the contracting parties." *Maximov* v. *United States,* 299 F.2d 565, 568 (2d Cir. 1962), aff'd 373 U.S. 49 (1963). Moreover, petitioners' contention has the effect of frustrating the delegates' goal of providing not only a uniform limited liability, but also a durable and flexible system of law, *Day* v. *Trans World Airlines, Inc.,* 528 F.2d, at 38.

Judge Mansfield also quite properly calls attention to the "judicial nightmare" that would ensue if petitioners' position were upheld (A.53a, A.54a). His concern with respect to the problems of applicable law facing the court in *In re Paris Air Crash of March 3, 1974,* 399 F.Supp. 732 (C.D.Cal. 1975) are justifiable. The choice of law problem in that litigation was aimed primarily at the aircraft manufacturer's liability, a liability which is not subject to the Warsaw Convention's provisions. One can readily imagine, therefore, the *additional* choice of law problems facing a court in a similar air crash disaster if petitioners' arguments are adopted. Thus, if the airline's employees are

not protected by the treaty's limitation of liability, additional problems of applicable law would be injected into litigation against the employee, e.g., whether ordinary negligence or willful misconduct must be proved against the employees; whether the employees are absolutely liable, as are their employers, under the Montreal Agreement; whether the treaty's jurisdictional-venue provisions in Article 28(1) take precedence over local rules; whether the treaty's two year statute of limitations in Article 29(1) applies. Other questions concerning the employees' relationship with other provisions of the treaty are not too difficult to imagine. These difficult questions are very real and, as Judge Mansfield noted (A.54a, A.55a), could very well arise in the numerous lawsuits arising out of the recent collision of two Boeing 747 aircraft in the Canary Islands which killed over 550 persons.*

The fallacy of petitioners' contentions has clearly been demonstrated by the decision of the Court of Appeals. That decision affords a sensible meaning to the treaty's pertinent provisions. That decision does not in any way burden the effective administration or application of its terms. Indeed, it reinforces our own ties with foreign nations with regard to international air transportation. It is the right decision.

---

* Indeed, similar questions have already been raised in the District Court in this case, i.e., whether the respondents, corporate officers of T.W.A., are legally responsible for the alleged nonfeasance under New York law, *Michaels* v. *Lipenard Holding Corp.,* 11 A.D.2d 12 (1st Dept. 1960), *if* New York law applies, rather than the law of New Jersey the place of their residence and where this action was originally commenced. In view of the fact that this accident occurred on the high seas, it may be that maritime law is applicable, 46 U.S.C. § 761, et seq. Similar issues are undoubtedly lurking in the background.

II.

There Is No Conflict of Decision

Petitioners do not and cannot show that the Court of Appeals' decision conflicts with any decision on this issue rendered by any state court or federal appellate court. Judge Mansfield's review of the case law clearly demonstrates that the within action is the only case to ever discuss and thoroughly consider the precise issue of whether the treaty's limitation of liability applies to the airline's *employees* (A.44a, A.45a, fn. 11). *Pierre* v. *Eastern Airlines, Inc.*, 152 F.Supp. 486 (D.N.J. 1957), the only other case ever confronted with this same issue, merely concluded in one short paragraph, and without any discussion or examination of legislative history, that the employee was not covered by the limitation. Judge Mansfield properly gave short shrift to *Pierre,* as have petitioners in their own petition. Although they contend in their petition (p. 10) that the Court of Appeals' decision in this case is in "direct conflict" with *Pierre* they make the same contention with respect to the *Stratton* case (Petition, p. 10), notwithstanding Judge Mansfield's clear statement as to why *Stratton* was not applicable (A.44a, fn. 11).

In addition, the decision of the Court of Appeals does not conflict with any known decision of any foreign tribunal. In view of the fact that 74 foreign nations have adopted or adhered to the Hague Protocol, *Aeronautical Statutes and Related Material,* pp. 512-514 (Civil Aeronautics Board 1974), it is extremely doubtful if there will ever be a conflicting decision on this issue in view of Article 25A of that Protocol.

Furthermore, petitioners cannot claim that the decision of the Court of Appeals will cause them immediate or irreparable injury. The Court of Appeals merely remanded

this case to the District Court with instructions to reinstate respondents' Warsaw-Montreal defense. It is still an open question as to the ultimate outcome of this litigation. Conceivably, petitioners may, upon proper evidence at the trial, obtain a jury verdict against respondents based upon willful misconduct and thereby be in the position to obtain damages in excess of the treaty's monetary limits. Or, they may establish willful misconduct against T.W.A. in their separate action against that defendant. Judge Pierson Hall, one of the most experienced Judges in the handling of aircraft accident litigation, adopted a similar approach when faced with the issue of the constitutionality of the Warsaw Convention. Judge Hall ruled that the determination of initial threshold questions of fact by the jury could make it unnecessary to decide that issue. See, *In re Pago Pago Air Crash of January 30, 1974,* 419 F.Supp. 1158 (C.D. Cal. 1976).

It is also possible that respondents, who performed their duties for T.W.A. in New York City, might be dismissed from this action on the ground that corporate officers are not liable as a matter of law for the alleged nonfeasance of these officers under New York law (R.7, ¶¶ 4-6). See, *Michaels* v. *Lipenard Holding Corp.,* 11 A.D.2d 12 (1st Dept. 1960); *Jones* v. *Archibald,* 45 A.D.2d 532 (4th Dept. 1974); *Lutz Feed Co., Inc.* v. *Audet & Company, Inc., et al.,* 72 Misc.2d 28 (1972); *2A Warren's Negligence,* § 3.03, pp. 50-55. Therefore, it clearly appears that petitioners are claiming nothing more than a possible or potential impairment of their ability to recover damages in excess of the treaty's limits. Such a possibility or contingency should not be sufficient to warrant review by certiorari. Cf. *Communist Party* v. *Subversive Activities Control Board,* 367 U.S. 1, 71 (1961). The issue in this case is uniquely narrow, and no amount of strained semantics with respect to supposed "conflicts" can convert it into one warranting review by this Court on certiorari.

III.

There Is No Important Question of Federal Law

While Judge Mansfield did say that this case presented an important question, he also indicated that the question was "novel" and was for the first time raised at the federal appellate level. So far as is known, this precise issue has never been raised in any state court or foreign tribunal. It can be reasonably said that in the 40 odd years since this treaty has been the law in this country, this is the *only* case which has ever delved into the specific issue of whether the carrier's *employees* are entitled to the limitation as well as their employer. Judge Mansfield's discussion of the cases in footnote 11 of his opinion (A.44a, A.45a) demonstrates that fact. However, the fact that this is the *only* case is not of the importance to warrant a review by this Court on certiorari. As mentioned above, there is no conflict on this issue with any of the other circuits. Nor can there be any conflict with the two District Court cases referred to by petitioners (petition, p. 8, fn. 6). The Pago, Pago aircraft accident litigation is set for trial during the week of October 3, 1977 in the Central District of California. In preparing for that trial the Court very recently followed Judge Mansfield's decision and denied plaintiffs' motion to strike the Warsaw defense pleaded by the airline's employees. In the other litigation referred to by petitioners, at JFK International Airport, it is respondents' understanding that no motions have been made attacking the Warsaw defense pleaded by the airline's employees. Even if such a motion is made it is obvious that the Eastern District of New York would be bound by the Second Circuit's decision in the instant case. Therefore, there are no decisions pending in aircraft accident litigation which are in conflict with the Second Circuit's decision.

It must also be considered that the Court of Appeals' decision does not leave the law regarding this treaty in an

unsatisfactory state. It is consistent with the expectations of the Warsaw Convention delegate who authored the draft Convention; it is consistent with the primary aim of the treaty, as announced in its Preamble, to obtain the advantages of regulating the liability of the carrier in a uniform manner; it is consistent with the law of those 74 member nations who have adopted the Hague Protocol, and its Article 25A; it is consistent with the views expressed by the Secretary of State which accompanied the President's letter of transmission of the Convention to the Senate in 1934 (see A.47a); and it is consistent with the continued efforts of the United States to improve the benefits accorded to passengers under this Treaty. See, *Day* v. *Trans World Airlines, Inc.*, 528 F.2d 31, 36-38 (2d Cir. 1975); see, also, Judge Mansfield's observations with respect to current efforts in this area, A.47a, A.48a, fn. 12.* Needless to say, had the Court of Appeals' decision been in petitioners' favor, the law regarding this treaty would indeed be in a very unsatisfactory state.

In view of the above, it is respectfully submitted that the petition does not present any "important" question of federal law that should be decided by the Court. *Block* v. *Compagnie Nationale Air France,* 386 F.2d 323 (5th Cir. 1967), *cert. den.* 392 U.S. 905, also presented a novel and important question arising under the Warsaw Convention.

---

* On July 20, 1977, the Civil Aeronautics Board approved an agreement to establish a Supplemental Compensation Plan pursuant to Article 35A of the Warsaw Convention, as amended by the Protocols at The Hague, 1955, and Guatemala City, 1971, and by the Additional Protocol No. 3 of Montreal, 1975. The Board's order discusses in detail the background, history and purposes of these amendments and explains the benefits of the amendments to the passengers and carriers. See, *Agreement CAB 25632, Docket No. 28713, Order 77-7-85.* In addition, the Senate Foreign Relations Committee is scheduled to vote on the advisability of the Senate ratifying Additional Protocol No. 3 of Montreal, 1975, during the week of September 26, 1977. If ratified, Protocol No. 3, which encompasses the Protocols of Hague and Guatemala, would replace the Warsaw Convention.

The issue in that case was whether a civilian *charter* flight was subject to the provisions of the treaty. Judge Wisdom of the Fifth Circuit said it was. This Court denied certiorari. Manifestly, there is no important question of Federal law requiring decision by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN J. MARTIN and
EDWARD M. O'BRIEN
Attorneys for Respondents

Of Counsel
BIGHAM ENGLAR JONES & HOUSTON